148 U.S. 240

RECORD, CASE No. 15,077.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1107.

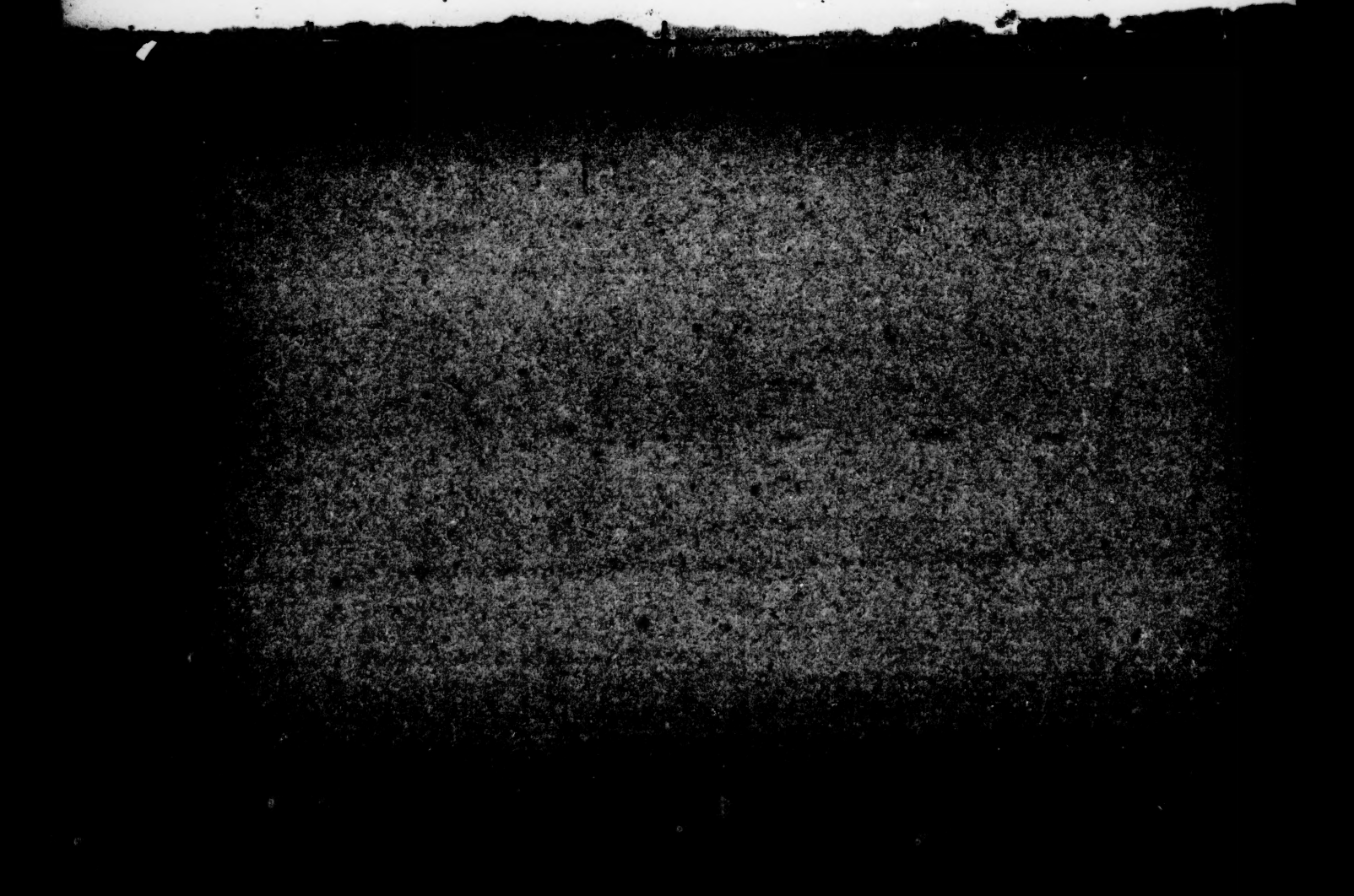
FRANK HUME, PLAINTIFF IN ERROR,

vs.

RICHMOND IRVING BOWIE, ADMINISTRATOR *DE BONIS NON CUM TESTAMENTO ANNEXO* OF THE ESTATE OF WILLIAM B. BOWIE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 7, 1892.



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a In the Supreme Court of the District of Columbia.

RICHMOND IRVING BOWIE, Administrator *de bonis non cum testamento annexo* of the Estate of William B. Bowie, Deceased,
vs.
FRANK HUME. } No. 25587. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration. Filed September* 12, 1884.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that certain persons, trading under the name, style, and firm of Hall & Hume, on the 1st day of February, A. D. 1877, by their certain promissory note, now overdue, promised to pay to the order of A. H. Pickrell and the defendant $24,750.81 two years after date, for value received, with interest at eight per cent. per annum, interest payable semi-annually, and the said payees endorsed the same to the plaintiff, and the said note was duly presented for payment and was dishonored, and the said payees on the 4th day of February, A. D. 1879, by writing endorsed on said note bound and held themselves responsible, jointly and severally, therefor without demand, notice, or protest; and the defendant on the 21st day of October, A. D. 1881, paid on said note $15,000 by notes of certain persons trading under the name, style, and firm of Hume & Cleary, but has not nor has any other person paid the balance of said indebtedness or any part thereof.

2. And the plaintiff sues the defendant for certain other money payable by the defendant to the plaintiff for that certain persons, trading under the name, style, and firm of Hall & Hume, on the 1st day of February, A. D. 1877, by their certain other promissory note, now overdue, promised to pay to the order of A. H. Pickrell and the defendant $24,750.81 two years after date, for value received, with interest at eight per cent. per annum, interest payable semi-annually, and the said note was duly presented for payment and was dishonored, and said Pickrell and the defendant by their writ-

ing on said note endorsed the same to the plaintiff before
2 maturity and held themselves responsible, jointly and severally, for the payment thereof without demand, notice, or protest, and on the 21st day of October, 1881, the defendant paid on said note $15,000 by notes of certain persons trading under the name, style, and firm of Hume & Cleary, but the defendant has not nor has any other person paid the balance of said note or any part thereof.

3. And the plaintiff sues the defendant for other money payable by the defendant to the plaintiff for that certain persons, trading under the name, style, and firm of Hall & Hume, on the 1st day of February, A. D. 1877, by their certain other promissory note, now overdue, promised to pay to the order of A. H. Pickrell and the defendant $24,750.81 two years after date, for value received, with interest at eight per cent. per annum, interest payable semi-annually, and the defendant endorsed the same to the plaintiff, and the said note was duly presented for payment and was dishonored, and the defendant, by writing endorsed on said note before maturity, bound and held himself responsible for the payment thereof without demand, notice, or protest; that on or about the 2d day of May, A. D. 1879, the said Pickrell departed this life, and the defendant, on the 21st day of October, A. D. 1881, paid on said note $15,000 by notes of certain persons trading under the name, style, and firm of Hume and Cleary, but has not nor has any other person paid the balance of said note or any part thereof.

4. And the plaintiff sues the defendant for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant and for work done and materials provided by the plaintiff for the defendant at his request and for money lent by the plaintiff to the defendant and for money paid by the plaintiff for the defendant at his request and for money received by the defendant for the use of the plaintiff and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims $24,750.81, with interest thereon at the rate of eight per cent. per annum from February 1st, A. D. 1877, to February 4th, A. D. 1879, and thereafter at the rate
3 of six per cent. per annum until paid, and the costs of suit.

B. G. LOVEJOY,
Attorney for Pl'ff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

B. G. LOVEJOY,
Attorney for Pl'ff.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, William B. Bowie, do solemnly swear that I am the plaintiff in the foregoing-entitled suit; that my cause of action is a certain

promissory note of certain persons trading under the firm name and style of Hall & Hume, dated February 1st, 1877, for $24,750.81, and payable two years after date to the order of A. H. Pickrell and the defendant, Frank Hume, with interest at eight per cent. per annum, interest payable semi-annually, endorsed by said Pickrell and Hume to me before the maturity thereof for value, and on which said note the said Pickrell and Hume, on the 4th day of February, 1879, made and signed the following endorsement: "We hold ourselves responsible, jointly and severally, for the within note without demand, notice, or protest. Feb. 4, 1879." That on the 21st day of October, A. D. 1881, $15,000 was paid on account of said note by the defendant on notes of certain persons trading under the firm name and style of Hume & Cleary; that the said note is just and true, and I claim thereby and am entitled on account thereof to the sum of $9,750.81, with interest on $24,750.81 at eight per cent. per annum from February 1st, A. D. 1877, to February 4th, A. D. 1879, and at six per cent. per annum from February 4, A. D. 1879, to October 21, A. D. 1881, and
4 on $9,750.81 at six per cent. per *cent. per* annum from October 21, A. D. 1881, until paid; that the amount claimed by me as aforesaid is justly due and payable by the defendant to me exclusive of all set-offs and just grounds of defense.

W. B. BOWIE.

Subscribed and sworn to before me this 11th day of September, A. D. 1884.

[SEAL.] J. D. COUGHLAN,
Notary Public.

Summons. Issued September 12, 1884.

In the Supreme Court of the District of Columbia, the 12th Day of September, 1884.

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term occurring 20 days after service of this writ on you to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

[SEAL.] R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

B. G. LOVEJOY, *Attorney.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

5 *Marshal's Return.*

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 12th day of September, 1884.

CLAYTON McMICHAEL, *Marshal.*

Pleas and Affidavit of Defendant. Filed October 6, 1884.

In the Supreme Court of the District of Columbia, the sixth day of October, 1884.

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

1. The defendant says that he did not promise as alleged.
2. And for a further plea the defendant says that he never was indebted as alleged.
3. And for a further plea the defendant says that the cause of action did not accrue within three years before the commencement of this suit.
4. And for a further plea the defendant says that he did not undertake and promise within three years before the commencement of this suit.
5. And for a further plea the defendant says that he did not, as alleged in the first, second, and third counts of the declaration, pay on the said note fifteen thousand dollars by notes of certain persons trading under the name, style, and firm of Hume & Cleary; and he further says that he did not by the said payment or otherwise, within three years, acknowledge the said cause of action, and that the said cause of action did not accrue within three years before the commencement of this suit.

W. G. DAVIDGE,
Attorney for Defendant.

6 DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

I, Frank Hume, do solemnly swear that I am the defendant in the above-entitled suit. I further say that my liability on the said note was only that of an accommodation endorser at the instance of the late Thomas L. Hume, who executed the said note in the name of Hall and Hume and received the consideration therefor.

I further say that my said liability accrued more than three years before the commencement of this suit and is barred by limitation, and that I did not, either by the alleged payment of fifteen thousand dollars or otherwise, keep alive the said liability or acknowledge the same. I am informed and believe that the said payment was made by the said Thomas L. Hume, and I deny that he undertook or was in any manner authorized to prolong or to affect my liability. I claim and am advised that in the lapse of time, without any ac-

knowledgment in the manner alleged or otherwise, I have a complete defense to this action.

FRANK HUME.

Subscribed and sworn to before me this fourth day of October, A. D. 1884.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk*.

Replication. Filed December 3, 1884.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

1 & 2. The plaintiff joins issue upon the defendant's 1st and 2nd pleas.

3. As to the 3d plea plaintiff says that within three years
7 next before the commencement of this suit the defendant acknowledged the several indebtednesses set out in said declaration and undertook and promised to pay the same and each of them.

4. As to the 4th plea plaintiff says that defendant did undertake and promise within three years before the commencement of this suit.

5. As to the 5th plea plaintiff says that the defendant, by the payment of fifteen thousand dollars by notes of certain persons trading under the name, style, and firm of Hume & Cleary, as set out in the first, second, and third counts of the declaration, and by other means in other ways and at other times within three years before the commencement of suit, did acknowledge the several indebtednesses in said three counts alleged, and undertook and promised to pay the same and each of them.

B. G. LOVEJOY,
Att'y for Pl'ff.

Rejoinder. Filed December 1, 1884.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

The defendant joins issue upon the plaintiff's replications to the third, fourth, and fifth pleas.

W. D. DAVIDGE, *For Def't.*

8 *Note of Issue. Filed December* 29, 1884.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

Plaintiff's attorney, B. G. Lovejoy.
Defendant's attorney, W. D. Davidge.
Last pleading filed December 13, 1884.

B. G. LOVEJOY,
Att'y for Pl'ff.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court, division No. 1, in and for said District, commencing the third Monday, it being the 16th day, of May, 1887.

MONDAY, *May 16th, A. D.* 1887.

By order of Walter S. Cox, justice presiding, one of the justices of said supreme court, the court is opened by proclamation of the marshal pursuant to order of court.

* * * * * * *

TUESDAY, *June 7th*, 1887.

The court resumes its session pursuant to adjournment, Justice Cox presiding.

* * * * * * *

WILLIAM B. BOWIE
vs.
FRANK HUME. } No. 25587. At Law.

Now comes here the plaintiff, by his attorneys, Messrs. Totten and Lovejoy, *as* the defendant, by his attorneys, Messrs. Davidge and Bradley, and a jury of good and lawful men of the District,
9 to wit, John D. Patten, Frederick A. Schmidt, Rozier J. Varnell, Millan Metzger, Charles C. Bryan, Charles Baum, John W. Allen, Thomas B. Queen, Charles W. Woods, William H. West, Justus Hollander, and Joseph Spransy, being duly sworn to try the issue above joined; whereupon the plaintiff, by leave of court, withdraws a juror and the other jurors are discharged from further considering this case and the plaintiff is allowed three days to amend his declaration.

Amendment to Declaration. Filed June 10, 1887.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

Amendment to declaration.

And now comes the said plaintiff, William B. Bowie, and, by leave of the court, amends his said declaration against the said defendant, Frank Hume, by adding thereto the following, to wit:

1. The said plaintiff sues the said defendant for certain other money payable by the said defendant to the plaintiff for that certain persons trading under the name, style, and firm of Hall and Hume, on the 1st day of February, A. D. 1877, by their certain promissory note, long overdue, promised to pay to the order of A. H. Pickrell and the defendant twenty-four thousand seven hundred and fifty $\frac{81}{100}$ dollars two years after date for value received, with interest at 8 per cent. per annum, interest payable semi-annually, with the privilege of paying all or any portion any time before maturity, and the said payees endorsed the same to the plaintiff before maturity, and the said payees, on the 4th day of February, A. D. 1879, by writing endorsed on said note, bound and held themselves responsible, jointly and severally, therefor without demand, notice, or protest, and the defendant on the 21st day of October, A. D. 1881, paid to the plaintiff on said note fifteen thousand dollars by notes of certain persons trading under the name, style, and firm of Hume and Cleary, but has not nor has any other person paid the balance of said indebtedness or any part thereof.

And the plaintiff claims judgment for $24,750.81, with interest and costs.

2. And the said plaintiff, for a further cause of action, sues the said defendant for certain other money payable by said defendant, Frank Hume, to said plaintiff for that certain persons trading under the firm name and style of Hall and Hume, on the first day of February, A. D. 1877, by their certain promissory note, dated on that day and long overdue, promised to pay to the order of A. H. Pickrell and the defendant twenty-four thousand seven hundred and fifty and $\frac{81}{100}$ dollars ($24,750.81) two years after date, for value received, with interest at eight (8) per cent. per annum, interest payable semi-annually, with the privilege of paying all or any part any time before maturity, and the said note is in the words and figures following, to wit:

WASHINGTON, D. C., *Feb'y 1st*, 1877.

Two years after date we promise to pay to the order of A. H. Pickrell and Frank Hume twenty-four thousand seven hundred and fifty and $\frac{81}{100}$ dollars, for value received, with interest at eight per cent. per annum, interest payable semi-annually.

HALL & HUME.

With the privilege of paying all or any portion any time before maturity.

HALL & HUME.

And the said payees afterward, to wit, on the said first day of February, 1877, endorsed the same to the plaintiff, and the said payees on the 4th day of February, A. D. 1879, by writing endorsed on said note, bound and held themselves responsible, jointly and severally, to the plaintiff for the payment of the said
11 note without demand, notice, or protest, and the said A. H. Pickrell, payee as aforesaid, afterwards, to wit, on the 2nd day of May, 1879, departed this life, and the said defendant on the 21st day of October, 1881, paid to the plaintiff on the said note fifteen thousand dollars ($15,000.00) by notes of certain persons trading under the firm name and style of Hume & Cleary, and although the said defendant afterward, to wit, on the 7th day of November, 1881, and on various other days between said date and the commencement of this suit, promised to pay to the plaintiff the balance due on the said note, the said defendant did not pay nor has any other person paid the balance due on said note nor any part thereof, but the same is still due to the plaintiff from the said defendant, and the plaintiff claims judgment for said sum of $24,750.81, with interest and costs of suit.

3. And the said plaintiff, William B. Bowie, for a further cause of action sues the said defendant, Frank Hume, for certain other money payable to the plaintiff by said defendant for that certain persons trading under the firm name and style of Hall and Hume, on the first day of February, 1877, by their certain promissory note, dated on that day and now overdue, promised to pay to the order of A. H. Pickrell and the defendant twenty-four thousand seven hundred and fifty and $\frac{81}{100}$ dollars ($24,750.81) two years after date, for value received, with interest at eight per cent. per annum, interest payable semi-annually, with the privilige of paying all or any portion any time before maturity, and said payees afterwards, to wit, on said first day of February, 1877, endorsed the same to the plaintiff, but no part of said note was paid before the maturity thereof, and the said payees on the 4th day of February, 1879, by writing endorsed on said note, bound and held themselves responsible to the plaintiff, jointly and severally, therefor without demand, notice, or protest, and the said Pickrell afterwards, to wit, on the 2nd day of May, A. D. 1879, departed this life, and the said defendant on the 21st
12 day of October, A. D. 1881, paid to the plaintiff the sum of fifteen thousand dollars of the said note and endorsed the said payment thereon, and afterwards, to wit, on the 7th day of November, A. D. 1881, and on many other days thereafter between said last-named date and the commencement of this suit promised to pay the plaintiff the balance due on said note, but said defendant has not nor has any person paid said balance or any part thereof, and the same still remains due from the said defendant to the plain-

tiff, and the plaintiff claims judgment thereon against the said defendant for the sum of $24,750.81, with interest and costs of suit.

B. G. LOVEJOY AND
ENOCH TOTTEN,
For Plaintiff.

Court Proceedings.

THURSDAY, *July* 7, *A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant.
} At Law. No. 25587.

On motion of the plaintiff, by his attorney, the court orders the defendant to plead to the amended declaration in fifteen days from this day.

13 *Demurrer to Amended Declaration. Filed July* 29, 1887.

WILLIAM B. BOWIE
vs.
FRANK HUME.
} At Law. No. 25587.

The defendant says that the plaintiff's amended declaration is bad in substance.

A. C. BRADLEY,
W. D. DAVIDGE,
Att'ys for Def't.

NOTE.—Among the matters of law to be argued in support of the above demurrer are the following:

1. As to the first count, that the note therein described is not negotiable.
2. As to the second and third counts, that—

a. The note described therein is not negotiable.
b. That the promise alleged is not upon consideration.
c. That said counts are bad for duplicity.
d. That said counts are defective in form because of unnecessary and redundant matter.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term at law for the month of October, A. D. 1887, commencing the first Tuesday, it being the 4th day, of October.

TUESDAY, *October 4th, A. D.* 1887.

By order of Walter S. Cox, justice, one of the justices of said supreme court, presiding, the court is opened for the dispatch of business by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

14 SATURDAY, *December 3rd, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

WILLIAM B. BOWIE, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

This cause coming on to be heard upon the defendant's demurrer to the plaintiff's amended declaration and the same having been heard, it is considered that the said demurrer be, and the same is hereby, overruled, and, on motion, leave is granted the defendant to plead over in ten days.

Plea to Amended Declaration. Filed December 13, 1887.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE
vs.
FRANK HUME. } No. 25587. Law.

And now comes the defendant, by his attorneys, and excepts to the ruling of the court in overruling the demurrer to the counts in the amended declaration, and, not waiving the said exception, for plea to each of said counts says—

That he did not promise as alleged.

A. C. BRADLEY,
W. D. DAVIDGE,
Att'ys for Def't.

Joinder in Issue. Filed December 15, 1887.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE
vs.
FRANK HUME. } Law. No. 25587.

15 The plaintiff joins issue upon the defendant's plea to amended declaration.

B. G. LOVEJOY,
ENOCH TOTTEN.
Att'ys for Pl'ff.

Court Proceedings.

Proceedings before second division circuit, special term, of this supreme court of the District of Columbia, commencing fourth Monday, January 23, 1888.

By order, Mr. Justice William M. Merrick presiding, the marshal of said District proclaims the said special term in session.

* * * * * * *

MONDAY, *April 9th*, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

* * * * * * *

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 30.

Now come here as well the plaintiff, by his attorneys, B. G. Lovejoy and Enoch Totten, as the defendant, by his attorneys, Andrew Bradley and W. D. Davidge, and a jury of good and lawful men of the District of Columbia, to wit, W. B. Orme, F. J. Acker, W. Wanstall, Louis Heilbrun, J. W. Selby, F. P. McNuntz, R. M. Green, L. A. Bailey, H. Bronaugh, H. C. Towers, C. K. Judson, and U. H. Ridenour, who, being sworn to try the issue above joined, after hearing the statement of the case, are respited until 10 a. m. Tuesday, April 10, 1888.

TUESDAY, *April* 10, 1888.

Session resumed pursuant to adjournment.
Present: Mr. Justice Wm. M. Merrick, presiding.

16 WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 30.

Come now here again the parties aforesaid in manner and form aforesaid and the same jury respited yesterday, who, after hearing the evidence in part, are again respited until 10 a. m. Wednesday, April 11, 1888.

WEDNESDAY, *April* 11, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 30.

Come here again the parties aforesaid in the manner and form aforesaid and the same jury respited yesterday, who, after hearing the evidence in part until hour of adjournment, are again respited until 10 a. m. Thursday, April 12, 1888.

THURSDAY, *April* 12, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law.

Come here again the parties aforesaid in manner and form aforesaid and the same jury respited yesterday, who, after having heard

the evidence until the hour of adjournment, are again respited until 10 a. m. Friday, April 13, 1888.

17 FRIDAY, *April* 13, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law.

Now again come here the parties aforesaid in manner and form aforesaid and the same jury respited yesterday, who, after hearing the evidence to conclusion, are respited until Monday, April 16, 1888, at 10 a. m.

SATURDAY, *April* 14, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 30.

Argued to the court by counsel of the plaintiff and defendant upon their respective propositions of the law that should be given by instruction to the jury.

MONDAY, *April* 16, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 30.

Come now here again the parties aforesaid in manner and form aforesaid and the same jury respited on Friday, *who*, after hearing the argument *pro* and *con* upon the instruction of the court
18 until near the adjournment, one of their number, R. M. Green, fell suddenly sick; thereupon the jury was respited until Friday next, April 20, 1888, at 10 a. m.

MONDAY, *April* 23, 1888.

Session resumed pursuant to adjournment.
Present: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 30.

Now come here again the parties aforesaid in manner and form aforesaid, and because it appears to the satisfaction of the parties and the court that the illness of R. M. Green, one of the jury im-

pannelled in this cause, is of such a serious form as to forbid his further service, it is, on agreement of the parties to the cause, ordered that the other jurors herein be, and hereby are, discharged from further considering said cause, and the same is ordered continued.

MONDAY, *May* 14, 1888.

Proceedings special circuit term of said court, 2d division, beginning second Monday May (14th), 1888.

By order Mr. Justice Wm. M. Merrick, presiding, marshal of the said district proclaims the said court open.

* * * * * * *

MONDAY, *May* 21, 1888.

Session resumed pursuant to adjournment.
Present: Mr. Justice Wm. M. Merrick, presiding.

19 WILLIAM B. BOWIE *vs.* FRANK HUME. } 25587. Law.

Now come here as well the plaintiff, by his attorneys, Enoch Totten and B. G. Lovejoy, as the defendant, by his attorneys, W. D. Davidge and Andrew C. Bradley, and a jury of good and lawful men of the District of Columbia, to wit, W. Lowry, C. H. Parker, C. Patten, H. Benzler, F. Geddis, F. B. Shafer, E. Brand, J. A. Gray, Annon Behrend, A. Hamilton, D. M. Frain, and A. L. Childs, who, being sworn to try the issue above joined, after hearing the evidence until the adjournment are respited until 10 a. m. to-morrow

TUESDAY, *May* 22, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE *vs.* FRANK HUME. } 25587. Law. Cal. 19.

Come here again as well the plaintiff as the defendant, by their respective attorneys, and the same jury respited yesterday, who, after hearing the evidence until the hour of adjournment, are again respited until 10 a. m. Wednesday, May 23, 1888.

WEDNESDAY, *May* 23, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE *vs.* FRANK HUME. } 25587. Law. Cal. 19.

20 Now again come here the parties aforesaid in manner and form aforesaid and the same jury respited on yesterday, who, after hearing the evidence to conclusion and the argument of

Mr. Lovejoy on behalf of the plaintiff and of Mr. Bradley — behalf of defendant until the hour of adjournment, are respited until Thursday, May 24, 1888, at 10 a. m.

THURSDAY, *May* 24, 1888.

Session resumed pursuant to adjournment.
Present, peesiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 19.

Now come again the parties aforesaid in manner and form aforesaid and the same jury respited yesterday, who, after hearing the argument of Mr. Bradley, in conclusion, for defendant, Mr. Davidge for defendant, and of Mr. Totten for plaintiff, are given the case and are retired to their room to consider of their verdict.

FRIDAY, *May* 25, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 19.

Now come again the parties aforesaid in manner and form aforesaid and the same jury respited yesterday, who on their oath say they find for the defendant. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiffs $— for his costs of suit and have his execution thereof.

21 *Motion for a New Trial. Filed May* 28, 1888.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE
vs.
FRANK HUME. } Law. No. 25587.

Motion for a new trial.

And now comes the said plaintiff and moves the court to set aside the verdict and judgment in this cause and to grant a new trial therein on the following grounds:

First. For errors of law founded on the exceptions reserved during the trial and noted on the minutes of the justice.

Second. Because the evidence was insufficient in law to sustain the verdict.

Third. Because the verdict is against law and contrary to the instructions of the court.

Fourth. Because the verdict is contrary to the evidence and unreasonable.

Fifth. Because the court erroneously limited the plaintiff's counsel in his cross-examination of a witness of the defendant.

ENOCH TOTTEN,
BENJ. G. LOVEJOY,
Att'ys for Pl't'ff.

SATURDAY, *June 2nd*, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 19.

22 On hearing the plaintiff's motion for a new trial herein it is considered that the same be, and hereby is, overruled; from which order the plaintiff, by his attorney, Mr. Totten, gives notice of his appeal.

Appeal to General Term. Filed June 5, 1888.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE
vs.
FRANK HUME. } Law. No. 25587.

Appeal to general term.

And now comes the said plaintiff and appeals to the general term from the order and judgment of the circuit court of June 2nd, 1888, denying his motion for a new trial.

ENOCH TOTTEN,
BENJ. G. LOVEJOY,
Att'ys for Plaintiff.

Appeal Bond to General Term. Filed June 12, 1888.

In the Supreme Court of the District of Columbia, the 2d Day of June, 1888.

WILLIAM B. BOWIE
vs.
FRANK HUME. } No. 25587. Law.

The plaintiff, having appealed to the general term from the judgment pronounced herein on the 2d of June, 1888, in the circuit court, and John A. Baker, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said gen-

eral term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

W. B. BOWIE, *Appellant.*
JOHN A. BAKER, *Surety.*

Satisfactory.

A. C. BRADLEY, *For Def't.*

Approved June 12, 1888.
WM. M. MERRICK, *A. J.*

23 *Motion to Admit, &c. Filed April* 8, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE
vs.
FRANK HUME. } Law. No. 25587.

And now comes Anne H. Bowie and suggests the death of the above-named plaintiff, William B. Bowie, and says that said William B. Bowie departed this life on the — day of December, 1888, and that on the 19th day of December, 1888, letters testamentary were duly issued to her, and that she has duly qualified as the executrix of the last will of said William B. Bowie, and accordingly she moves the court to pass an order admitting her to prosecute the above cause instead of said deceased against the said defendant.

ENOCH TOTTEN,
B. G. LOVEJOY, *For Pl'ff.*

Proceedings before the supreme court of the District of Columbia, holding a circuit court in and for said District, commencing the fourth Monday, it being the 28th day, of January, A. D. 1889.

MONDAY, *January* 28, *A. D.* 1889.

By order of Chief Justice Edward F. Bingham, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

MONDAY, *April 8th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

24 WILLIAM B. BOWIE
vs.
FRANK HUME. } 25587. At law.

And now comes here Anne E. Bowie and suggests the death of the above-named plaintiff, and that she has been duly qualified as executrix of said decedent by the orphans' court of —, and moves the court for leave to prosecute the said suit in the place of said deceased against the said defendant; and thereupon it is ordered that

the appearance of the said Annie E. Bowie, as executrix as aforesaid, be, and the same is hereby, now made of record; that said suit stand revived in the name and be in the same plight and condition as when the plaintiff departed this life.

Motion to Set Aside. Filed April 23, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At law. No. 25587.

Motion to set aside verdict and judgment.

And now comes the plaintiff in the above cause and moves the court here to set aside the verdict and judgment and to grant a new trial therein, because the bill of exceptions containing the exceptions reserved on the trial of the cause cannot be settled, signed, and sealed as required by law, the justice of this court, who presided at the trial of this cause (in division No. 2, May term, 1888, of this court) having departed this life without having settled or signed and sealed the same.

ENOCH TOTTEN,
B. G. LOVEJOY, *For Pl'ff.*

25 *Affidavit. Filed April* 23, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

Affidavit in support of the motion for a new trial in the above-entitled cause.

DISTRICT OF COLUMBIA, *ss:*

I, Benjamin G. Lovejoy, being first duly sworn, do depose and say that I am one of the counsel of record for the plaintiff in the above-entitled cause, and that said cause came on for trial on the — day of May, 1888, in the division No. 2 of the circuit court, held by Mr. Justice Merrick, in pursuance of the orders of the general term of this court, passed on the 3rd day of January, 1888, and the 27th day of April, 1888, and that said trial resulted in a verdict and judgment on the 25th day of May, 1888, in favor of the defendant, and that the said court (division No. 2) ceased to try causes on the 14th day of July, 1888.

On the 28th day of May, 1888, a motion for a new trial, founded on the exceptions reserved during the said trial, was filed, which was entertained by the said justice holding said court, and was by him afterwards and on the 2nd day of June, 1888, by said court

overruled, and from this decision an appeal to the general term was taken.

The said term of the said circuit court (division No. 2) was not then and never to this day has been finally or formally adjourned without day, and the records, entries, and minutes do not show that any such adjournment *sine die* has been made of the said term.

Division No. 1 of said circuit court was adjourned *sine die*
26 on the 14th day of July, 1888, save and except as to those cases therein wherein bills of exception were to be prepared, and as to those cases the court was prolonged for that purpose.

During the trial of the said cause as aforesaid numerous exceptions were taken to the rulings and instructions of the said court, which were, before verdict, entered upon the minutes of the said justice presiding at said trial, but the same were not reduced to writing at the time, and the trial was proceeded with upon the noting, as aforesaid, of the exception. On the 14th day of July, 1888, on which day the said division No. 2 of said circuit court ceased to try causes, an order was made by said court (division No. 2) and entered of record prolonging the said term of said court in order to give opportunity to prepare and settle a bill of exceptions in the said cause as well as in other causes tried in the said division of said court at said term.

It is and has for many years been the custom in this court to hold no trials of civil causes at law between about the middle of July and the month of October in each year, and the period including the latter part of the month of July, the whole of the month of August, and a part of the month of September of each year has usually been almost universally devoted to rest from professional labors or to a summer vacation by the bar and bench of the said supreme court of the District of Columbia.

Immediately after said "summer vacation" of 1888 counsel for the plaintiff in the above cause began the preparation of the formal bill of exceptions for the purpose of embodying the exceptions as aforesaid to the said rulings and instructions of the court during said trial, and on or about the 4th day of October, 1888, completed the same and on that day tendered them to counsel of record for the defendant for the purpose of settling them by agreement of counsel. Two of said counsel promptly examined the said bill of exceptions, but retained the said bill of exceptions so tendered in order to give opportunity to the third counsel for defendant to examine them until the 23rd day of March, 1889, when the same were returned to counsel for the plaintiff.

27 About the 11th or 12th day of December, 1888, said presiding justice, the Hon. William M. Merrick, while sitting in general term of this court, being ill, left the court and never returned to it and never afterwards attended to any further official business, and on the — day of February, 1889, died, the said bill of exceptions never having been settled, signed, or made of record.

All the proceedings on the said trial were fully and carefully reported by an experienced and skillful stenographic reporter jointly employed by the parties to the cause, and his report thereof was

soon after the trial written out and copied by means of a typewriter, and copies thereof were delivered to the parties and the same are now easily accessible.

The plaintiff in the said cause, William B. Bowie, also departed this life on the — day of December, 1888, and Annie H. Bowie, his widow, has been duly appointed and has qualified as the executrix of his last will and testament.

True copies of the following specified rules of the supreme court of the District of Columbia in force at the time of said trial and now in force and the following orders and entries forming parts of the judicial records of this court, duly certified by the clerk thereof, attested by the seal of this court, are hereto attached and reference is hereby made to the same as a part of this affidavit, to wit:

1. Rule No. 1, fixing the terms of this court.
2. Rule No. 61.
3. " " 62, relating to bills of exceptions.
4. " " 64.
5. Copy of the two orders of the general term of this court providing for two terms of the circuit court, to be called division No. 1 and division No. 2, dated January 3rd, 1888, and April 27th, 1888.
6. Copy of the entry of verdict and judgment in this cause.

28 7. Copy of entry of order of July 14, 1888, extending the said term (division No. 2) for the purpose of giving opportunity to prepare and settle bills of exceptions.

8. Copy of order prolonging circuit court No. 1 for the purpose of preparing and settling bills of exceptions.
9. Order of general term, dated January 24th, 1889, assigning justices to the different branches of the court for 1889.

BENJAMIN G. LOVEJOY.

DISTRICT OF COLUMBIA, *ss:*

Benjamin G. Lovejoy personally appeared before me, in my office, on the 22d day of April, 1889, and made oath that he had read the foregoing affidavit by him subscribed, and that he knows the contents thereof, and that the same is true according to his best knowledge, information, and belief.

R. J. MEIGS, *Clerk*,
[SEAL.] By R. J. MEIGS, JR.,
Ass't Clerk.

Certificate of Clerk.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the following rules of court, to wit,

rules No. 2, No. 54, No. 61, No. 62, and No. 64, were in force in this court on the 1st day of May, 1888, and that they have ever since been and now are of force in said court.

Rule No. 2.

TERMS OF COURT.—The terms of the court shall be held as follows:

Of the general term on the—
29 4th Monday of January.
4th Monday of April.
1st Monday of October.
Of the circuit court on the—
4th Monday of January.
2nd Monday of May, which term shall not continue beyond the 2d Saturday in July except to finish a pending trial.
Of the district court on the—
1st Monday of June.
1st Monday of December.
Of the criminal court on the—
1st Monday of March.
3rd Monday of June.
1st Monday of December.
Of the special terms on the 1st Tuesday of every month except August, in which month there shall be no term of court.

Rule 54.

Motions for new trial may be grounded on errors of law in the rulings of the justice presiding at the trial.

1. The motion may be made upon the bills of exceptions, in which case it must be filed in the circuit court, but shall be heard in the general term in the first instance.

2. The justice who tried the cause may, in his discretion, before any bills of exceptions are prepared, entertain a motion to set aside the verdict for errors of law founded on the exceptions reserved during the trial and noted on his minutes. An appeal may be taken from the decision of the justice on such motion, in which case a bill of exceptions must be settled in the usual manner.

Rule 61.

If a party desires to present for review in the general term the rulings or instructions of the presiding justice for alleged errors of law, he must at the trial and before verdict except
30 to such rulings or instructions; and he may at the time of taking exceptions reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes and proceed with the trial and afterwards settle the bill of exceptions. Rules S. C. D. C., p. 26.

Rule 62.

The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it. Rules S. C. D. C., p. 26.

Rule 64.

In case the judge is unable to settle the bill of exceptions and counsel cannot settle it by agreement a new trial shall be granted. Rules S. C. D. C., p. 27.

And I further certify that the following orders and entries appear of record in this court, to wit:

Copy of order of general term directing the terms of the circuit court, dated January 3rd, 1888.

TUESDAY, *January 3rd*, 1888.

Ordered further that in addition to the circuit court to be held by Justice Hagner on the fourth Monday of January, 1888, a second circuit court shall be held at the same time by Justice Merrick in the western audience-room of the south front of the court-house, the court to be held by Justice Hagner to be known as division No. 1 and the court to be held by Justice Merrick to be known as division No. 2.

The cases on the first half of the calendar shall be tried in division No. 2 and the cases on the last half of the calendar shall be tried in division No. 1.

The first twenty-six jurors drawn for service in said courts shall serve in division No. 1 and the 26 jurors next drawn shall serve in division No. 2.

31 *Copy of Order of General Term Containing said Two Terms, Dated April* 27, 1888.

Ordered that the circuit courts now being held in divisions Nos. 1 and 2 be continued further in same order by same justices through the May term thereof.

Copy of Entry of the Verdict and Judgment in This Cause.

FRIDAY, *May 25th*, 1888.

Session resumed pursuant to adjournment.

Present, presiding: Mr. Justice Wm. M. Merrick.

WM. B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 19.

Now come again the parties aforesaid in manner and form aforesaid and the same jury respited yesterday, who on their oath say they find for the defendant. Therefore it is considered that the

plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff $— for his costs of suit and have his execution thereof.

Copy of Order Prolonging Term of Division No. 2, of Date July 14th, 1888.

SATURDAY, *July* 14, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

* * * * * * *

By order of the court the May term of the circuit court, division No. 2, is hereby entered as extended that the bills of exceptions not yet filed may be settled, to wit:

* * * * * * *

BOWIE *vs.* HUME. } 25578. At Law.

* * * * * * *

32 *Copy of Order Prolonging Term of Division No. 1, of Date July 14, 1888.*

Division No. 1.

JULY 14, 1888.

The court orders the term of this court extended for the purpose of settling bills of exceptions and case in the following cases * * * (5 cases named); and thereupon the May term adjourned without day except as above stated.

Copy of Order of General Term, January 24, 1889, Assigning Justices.

THURSDAY, *January* 24, 1889.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Chief Justice Bingham, Hagner, and James.

Assignment of Justices for 1889.

Ordered that the assignment of justices to serve in the supreme court of the District of Columbia for the year 1889 be as follows:

First, for the general term, Justices Hagner, James, and Merrick; second, for the circuit court, Chief Justice Bingham; third, for the equity and orphans' court, Justice Cox; fourth, for the district court, Justice James; fifth, for the criminal court, Justice Montgomery.

Witness my hand and the seal of said court this 5th day of April, 1889.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Ass't Clerk.

33 *Notice. Filed May* 10, 1889.

In the Supreme Court of the District of Columbia, May Term, Circuit Court, Division No. 2, 1888, Prolonged.

BOWIE'S EX'X
vs.
FRANK HUME. } At Law. No. 25587.

Please take notice that on Tuesday next, the 14th day of May, 1889, at the opening of court (Chief Justice Bingham) on that day or as soon thereafter as counsel can be heard, I shall call up the motion in the above cause now on file to set aside the verdict and judgment and to get a new trial.

This motion will be called up before Bingham, C. J., holding the circuit court.

ENOCH TOTTEN AND
B. G. LOVEJOY,
Att'ys for Pl't'f.

To W. D. Davidge, S. T. Thomas.

Copy rec'd May 10, 1889.

S. T. THOMAS.

Certificate of Register of Wills. Filed May 25, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EX'X
vs.
FRANK HUME. } At Law. No. 25587.

I, Dorsey Clagett, do hereby certify that I am register of wills of the District of Columbia and was such register during the entire month of August, 1888.

34 I further certify that it appears from the records in my office (proceedings No. 19) that William M. Merrick, late one of the justices of said court, held a special term of said court for probate and orphans' court business on the 6th, 8th, 10th, 13th, 20th, 22nd, and 30th days of August, 1888.

Witness my hand and the seal of said court for orphans' court business this 15th day of May, A. D. 1889.

[SEAL.]

DORSEY CLAGETT,
Register of Wills, D. C.

Certificate of R. J. Meigs. Filed May 25, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EX'X
vs.
FRANK HUME. } At Law. No. 25587.

I, R. J. Meigs, clerk of said court, do hereby certify that the following is a true copy of the order adjourning the October term, 1888, of the circuit court of the supreme court of the District of Columbia passed by Mr. Justice Hagner the 26th day of January, 1889, as the same is recorded in Minutes 23, page 420, of said court, viz:

"The court orders the term of the court extended to settle bills of exceptions or case in cases tried at this term of the court; and thereupon the October term of this court is adjourned without day except as above."

Witness my hand and the seal of said court this 15th day of May, A. D. 1889.

R. J. MEIGS, *Clerk*,
[SEAL.] By J. R. YOUNG, *Ass't Clerk.*

35 *Affidavit of A. C. Bradley. Filed May* 25, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EX'X
vs.
FRANK HUME. } At Law. No. 25587.

Andrew C. Bradley, being duly sworn, says that he was one of the attorneys for the defendant in the trial of the above-entitled cause, in which a verdict was rendered and judgment thereon entered for defendant May 25, 1888; that early in the month of October next the plaintiff's proposed bill of exceptions was left in affiant's office for examination; that such examination was made by affiant in the latter part of that month or the first part of November. Some suggested amendments were noted thereon in pencil and the bill of exceptions then, in the first part of November, as well as affiant can now recollect, was handed to Mr. Sidney T. Thomas for examination by him. Later in that month affiant was informed by Mr. Thomas that Mr. W. D. Davidge, attorney of record for defendant, was satisfied to have the bill of exceptions signed by the court, provided the amendments suggested by affiant and by Mr. Thomas should be made, and with affiant's assent he believes that said bill of exceptions was forthwith delivered to the attorney of the plaintiff with such information; that thereafter affiant was informed that counsel for plaintiff had agreed to make the suggested corrections, except in one or two particulars, which counsel for defendant insisted upon, and counsel for plaintiff were informed that the court must settle those points unless they agreed to them, which they de-

clined to do; that this was prior to the time when Mr. Justice Merrick was taken sick; that affiant, as he now recollects, after Justice Merrick was taken sick, more than once urged upon Mr. Lovejoy, one of plaintiff's attorneys, the importance of having this matter attended to before Justice Merrick should be incapacitated by
36 illness; that affiant was willing to attend before Justice Merrick at any time for that purpose, but nothing was done nor was any proposition made to affiant to attend before Justice Merrick to settle said bill of exceptions.

That after the death of Justice Merrick and prior to the appointment of affiant as his successor affiant does not recall anything as having been said by attorneys for plaintiff to him in reference to such matter.

A. C. BRADLEY.

Subscribed and sworn to before me this 10th day of May, A. D. 1889.

[SEAL.] ALBERT HARPER,
Notary Public.

Affidavit of S. T. Thomas. Filed May 25, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

Affidavit in opposition to motion for a new trial in the above-entitled case.

Sidney T. Thomas, having been first duly sworn, deposes and says that he is one of the counsel for the defendant in the above-entitled cause and was such counsel, though not of record, when the cause was tried and took part in the trial thereof.

Affiant has been a member of the bar of this court for about fifteen years, and he denies that during that time it has been the custom of the bench and bar of the supreme court of the District of Columbia to cease their labors from the middle of July to the first of October and enter upon their "summer vacation;" on the contrary, a special term of said court in equity sits every month in the year except August, and the orphans' court is held weekly every month
37 in the year and a great volume of equity and orphans' court business is transacted during the months of July and September, which requires the presence of at least one of the justices of said court and the bar generally. Moreover, affiant has a general recollecton that both of the counsel for the plaintiff in this cause were in this city nearly all the time between the 25th day of May, 1888, and the 4th day of October, in that year, and he does not believe that either of said counsel was absent from the city for two weeks at a time during that period. Especially is this so of Mr. Lovejoy.

Affiant further says that he received a draft of a bill of exceptions in this cause, prepared by the plaintiff's counsel, from Mr. A. C. Bradley (now one of the justices of the supreme court of the District of Columbia), who was originally of counsel for the defendant, on or about the 1st day of November, 1888, and at once proceeded to examine the same; that about the 15th day of November, 1888, having finished his labors, he handed the document to Mr. W. H. Smith, the stenographer, who reported the trial of the case and who called for it at the request of Enoch Totten, Esq., one of the plaintiff's counsel, saying to him (Mr. Smith) that counsel for the defendant had noted in lead pencil on the margin the changes they desired made in the statement of the evidence in the cause, and that if counsel for the plaintiff would agree to the proposed changes the bill might be presented to Justice Merrick, who tried the cause, for his signature; that said Smith took said proposed bill away with him for Mr. Totten and returned with it in about a week or ten days, saying that the plaintiff's counsel had agreed to certain of the changes desired by the defendant's counsel, but would not agree to certain other changes proposed by the defendant's counsel, especially those in regard to the statement of the testimony of the plaintiff himself. Affiant then requested the said Smith, who was acting for Mr. Totten in the matter and who occupied the same office with him, to notify the counsel for the plaintiff that they must appeal to the court to settle the bill of exceptions, because it was plain counsel could not agree as to what
38 it should contain. When this occurred Justice Merrick, who tried the cause, was still on the bench and attending to his duties, which he continued to discharge until the 14th day of December, 1888, when, owing to illness, he left the court-house and did not again return to it; that Justice Merrick resided at 1716 N street N. W., in Washington, D. C., from the time of said trial to his death, which occurred about the 6th of February, 1889, but was not too ill for a month after he left the bench, as affiant is informed and believes, to have settled the bill of exceptions at his house if the same had been presented to him. Affiant and his colleagues were ready at all times to have attended to the matter and would readily have gone to the justice's house if they had been summoned by the justice or even been requested by the plaintiff's counsel to settle the bill of exceptions, but nothing was said or done by the counsel for the plaintiff after the proposed bill of exceptions was returned to affiant as aforesaid, and, the plaintiff having died some time in December, 1888, and no steps having been taken in this court until April 8, 1889, to revive the cause, affiant supposed the suit was abandoned. Affiant further says that the proposed bill of exceptions was allowed by the plaintiff's counsel to remain in affiant's office from the time Smith left it there until about the 23rd day of March, 1889, when affiant handed it to Mr. Totten, at his request, in affiant's office, this being the first time the plaintiff's counsel had alluded to the case after December 1, 1888, although affiant had notified Mr. Totten through Mr. Smith when he left the proposed bill that counsel for the defendant could not agree with counsel for the plaintiff as

to the statement of the evidence in the proposed bill of exceptions, and an appeal would have to be taken to the justice who tried the cause to settle the same. Affiant further says he was ready and willing at all times after the 1st of December, 1888, to have delivered the proposed bill of exceptions to the counsel for the plaintiff if they had only called or sent for the same; that he had no use for it and had finished his examination of it by December 1,
39 1888, and he denies that after that time the proposed bill of exceptions was retained by him until March 23, 1889, in order to give the "third counsel" for the defendant an opportunity to examine the same. On the contrary, he says the said "third counsel" (Mr. W. D. Davidge), several days before the 1st of December, 1888, had said to affiant that he did not wish to examine the bill of exceptions; that he left that matter to Mr. Bradley and affiant.

S. T. THOMAS.

Subscribed and sworn to before me this 11th day of May, A. D. 1889.

[SEAL.] HOWARD M. NORRIS,
Notary Public.

Affidavit of Frank Hume. Filed May 25, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S Ex'x
vs.
FRANK HUME. } At Law. No. 25587.

Personally appeared Frank Hume, who, having been first duly sworn, deposes and says that he is the defendant in the above-entitled cause, and that immediately after the trial thereof in May, 1888, he urged upon his attorneys, Messrs. W. D. Davidge, A. C. Bradlay, and S. T. Thomas, the importance to him of having the bill of exceptions in this case settled and signed by Justice Merrick as soon as possible after the trial, and that on several occasions prior to the illness of Justice Merrick he requested his counsel to see the plaintiff's counsel and ask them not to further delay the preparation of their bill of exceptions. Affiant further says that Mr. Bradley and Mr. Thomas, of his counsel, from time to time until the death of Justice Merrick, informed him in response to his inquiries that they had spoken to the plaintiff's attorneys about the bill of exceptions, reminding them more than once that their client, Mr. Bowie, was an old man, he being then upwards of seventy years of age, and that his death before this cause was
40 finally closed might place affiant at great disadvantage. Affiant further says that on two of his counsel, viz., Mr. Bradley and Mr. Thomas, devolved the duty of attending to the bill of exceptions, so far as he was concerned, Mr. Davidge, affiant's other attorney, having informed him very soon after the trial that he

expected them to attend to that matter. Affiant further says that Justice Merrick, who resided in Washington, at 1716 N street N. W., had a country place near Ellicot City, Maryland, where he usually went to spend the summer months; that, as affiant is informed and believes, Justice Merrick usually retired to his place in the country about the first of June, returning to his Washington residence about the first of October, but that the justice's summer residence near Ellicot City did not interfere with the discharge of his official duties in Washington; on the contrary, he came to the city almost every day and held court right along, as though he resided in Washington; that Justice Merrick, as affiant is informed and believes, was in Washington almost daily during the month of July, 1888; that he held the orphans' court every week during the month of August, 1888, as appears by the certificate of the register of wills, herewith filed, and that he was in Washington two or three times a week during the month of September, 1888, and returned to his Washington residence the first of October, 1888, taking his place in the general term of said court; that it was only necessary, as affiant is informed and believes, for those having business with Justice Merrick while he was in the country to have notified him by mail or telegraph and he would have promptly responded. Affiant further says he is informed and believes that the plaintiff's attorneys in this cause are at fault in not having the bill of exceptions ready before the first of October; that the trial was stenographically reported by a competent and skillful reporter, Mr. W. H. Smith, employed by the plaintiff; that the stenographer's notes were transcribed and written out on a typewriter in duplicate each day as the trial progressed and a copy furnished each side, which, as affiant is informed and believes, did much to lessen and simplify the labors
41 of counsel in preparing the bill of exceptions; that under these conditions and the fact—for affiant is informed and believes it is a fact—that not only the justice who tried the case was practically in Washington all summer and the plaintiff's counsel were absent from the city very little of that time, affiant says he is advised and believes that it is the fault of said counsel that the bill of exceptions in this case was not signed and sealed in due season. Affiant further says he is informed and believes that his counsel, immediately on the plaintiff's counsel submitting to them the draft of their proposed bill of exceptions, proceeded to examine the same and finished their labors about the 20th of November, 1888, and notified the plaintiff's counsel that unless certain changes they desired made in the statement of the testimony of several of the witness- who testified in the cause, especially that of the plaintiff (Bowie) himself (the proposed changes being noted in lead pencil on the margin of the pages of the bill where the objections occurred), were made an appeal would have to be made to the court to settle the bill, as provided by the rules of the court; that at this time Justice Merrick, who tried the cause, had returned to Washington and was attending to his official duties; that notwithstanding this notice to the plaintiff's counsel that affiant's counsel could not

agree with them as to what the bill of exceptions should contain and that it would be necessary therefore to present the matter to Justice Merrick, affiant is informed and believes that the plaintiff's counsel allowed the matter to stand without any action until about the 23rd day of March, 1889, after the death of the justice who tried the cause, when, affiant is informed, one of the counsel for the plaintiff, Mr. Enoch Totten, called on Mr. Thomas, one of affiant's counsel, and received the draft of the bill of exceptions left with that gentleman in November, 1888, although affiant has been informed by Mr. Bradley, the successor of Justice Merrick and formerly one of affiant's counsel, that when Justice Merrick was ailing and it looked as though he might get very ill that he (Bradley) cautioned Mr. Lovejoy, of the plaintiff's counsel,
42 to have the bill of exceptions settled before the justice got too ill to do it; but no effort was made by the plaintiff's counsel, as affiant is informed and believes, to have Justice Merrick settle the bill at his house, although, as affiant is informed and believes, his ailment did not incapacitate him from acting upon the bill until toward the latter part of January, 1889. Affiant is informed by his counsel that they were ready and willing at all times to have attended before the justice, either at chambers or at his house, to settle the bill of exceptions, but that they were never requested by the plaintiff's attorneys so to do. Affiant further says he is informed and believes the difference between his counsel and the counsel for the plaintiff over said bill of exceptions was not very great and related almost entirely to the statement of the testimony of the plaintiff himself, and that said objection could readily have been removed by substituting literally the testimony of the plaintiff on the point or, for that matter, his entire testimony as reported by the stenographer, which he is advised by his counsel they proposed to the plaintiff's counsel to do.

Affiant further says that he is advised by his counsel that the death of the plaintiff in this action may place him, in the event of a new trial, at a great disadvantage; that it is extremely doubtful whether on a retrial of the case affiant could testify in his own behalf unless called as a witness by the plaintiff or required by the court to testify, and he might thus be deprived of the privilege, through no fault of his own, of giving his testimony, which he is advised is of the first importance to his defense; that but for the fact that his testimony may be inadmissible on a retrial affiant would readily agree that the successor of Justice Merrick or any other member of the court might sign the bill; but in view of the laches of the counsel for the plaintiff in failing to place their bill of exceptions in the hands of Justice Merrick for settlement, as he is informed and believes by the 63rd rule of this court it was their duty to do after they had been notified by affiant's counsel that
43 they could not settle the bill by agreement, and especially in view of the death of the plaintiff since the trial, which, as before stated, he is advised by his counsel may place him at very great disadvantage, if there is to be a new trial affiant objects to the granting of the present motion, but agrees, so far as he is able

to agree, that in substituting in the bill of exceptions the entire testimony of the former plaintiff, William B. Bowie, in lieu of the statement of it contained in the proposed bill of exceptions the bill of exceptions may be signed by any member of said court in the place of Justice Merrick, who tried the cause, provided in the event of a retrial the testimony of both affiant and William B. Bowie, the former plaintiff, may be read in evidence to the jury.

FRANK HUME.

Subscribed and sworn to before me this 25th day of May, A. D. 1889.

ALBERT HARPER,
Notary Public.

[SEAL.]

Affidavit of A. W. Ferguson. Filed May 28, 1889.

List of law causes on appeal to the general term, supreme court District of Columbia on the calendar of that court for April term, 1889, showing the dates of the several judgments and the time of filing the bills of exceptions in each cause.

Title of causes.	No. at law.	Date of judgt.	Date of filing bill of ex'ns.	Remarks.
Nat'l B'k Republic *vs.* Bigelow.	23778	June 3d, '85		
Thayer *vs* Duncanson	24839	July 2, '86	Oct. 5, '86	About 3 months.
44				
Dist. Col. *vs.* Johnson	19485	Nov. 15, '86	M'ch 5, '87	About 4 months.
Fitzgerald *vs.* B. & P. R. R. Co.	24699	Dec. 14, '86	Feb. 26, '87	About 2½ months.
Cochran *vs.* Hume	25408	Feb. 16, '87	July 8, '87	About 5 months.
Bryan *vs.* Duncan	26843	Feb. 19, '87	None.	
Smith *vs.* May	21741			
Mustin *vs.* Lowe	28085	Never	appealed.	
Harmon *vs.* W. & G. R. R. Co.	24010	Dec. 1, '87	Jan. 21, '88	About 1½ months.
Dist. of Col. *vs.* Wash. G. L't Co.	22757	M'ch 14, '87	Jan. 23, '88	About 10 months.
Johnson *vs.* Johnson	26258	Jan. 28, '88	May 28, '88	About 4 months.
Githens *vs.* Berlin	26553	Jan. 28, '88	May 28, '88	4 months.
McGill *vs.* Wheeler	26477	Apr. 23, '88	May 24, '88	1 month.
45 Wright *vs.* Dearing	25467	Dec. 12, '87	May 3, '88	About 5 months.
Fowler *vs.* Saks	26486	Feb. 7, '88	Apr. 25, '88	About 2 months.
Barnard, rec'r, *vs.* Jones	14064	July 21, '75		
Justh *vs.* Wilson	27550	Jan. 26, '88	May 10, '88	About 4 months.
McIntire *vs.* McIntire	26788	Feb. 11, '88		
McCann *vs.* B. & O. R. R. Co.	26490	Feb. 24, '88	May 23, '88	3 months.
Williams *vs.* Roney	27768	M'ch 7, '88	Apr. 27, '88	About 1½ months.
U. S., use Davis, *vs.* Henderson.	25959	Appeal on demurrer.		
Burgdorf *vs.* Cingria	26333 and 26334	M'ch 1, '88	May 15, '88	About 2½ months.
Burgdorf *vs.* Davis	26335	M'ch 1, '88	No ex.	
Neale *vs.* Lee	26753	M'ch 9, '88	May 16, '88	About 2 months.
46 Wright *vs.* Lee	26754	M'ch 13, '88	May 16, '88	About 2 months.
Baier *vs.* Cornwell	27429	Feb. 2, '88	May 8, '88	About 2 months.

List of Law Causes on Appeal, &c.—Continued.

	Title of causes.	No. at law.	Date of judgt.	Date of filing bill of ex'ns.	Remarks.
	Prindle *vs.* Campbell	26535	Feb. 23, '88	June 9, '88	About 3½ mos.
	Woodsey *vs.* B. & P. R. R. Co.	26927	M'ch 16, '88	May 10, '88	About 2 months.
	Ketcham *vs.* Bramhall	27475	M'ch 21, '88	July 6, '88	About 3½ mos.
	Johnson *vs.* B. & P. R. R. Co.	25497	Apr. 12, '87	May 31, '87	About 1½ mos.
	Sanders *vs.* Wilson	28057	Apr. 4, '88		
	Pitney & B. *vs.* Chapman	27633	Apr. 9, '88	May 24, '88	About 1½ mos.
	Viedt *vs.* Evening Star	28421	M'ch 31, '88		
	Humphrey *vs.* Herdic Co.	27097	Apr. 9, '88	May 11, '88	About 1 month.
	Fay *vs.* Auglim	26970	Apr. 5, '88	May 10, '88	About 1 month.
47	Manning *vs.* Union Transfer Co.	26759	Apr. 19, '88	No ex. filed.	
	Pratt *vs.* B. & P. R. R. Co.	27384	Apr. 6, '88	May 12, '88	About 1 month.
	Wolf *vs.* Grief	28207	Apr. 23, '88	May 25, '88	About 1 month.
	Johnston *vs.* Johnston	26257	Dec. 2, '87	May 4, '88	About 5 months.
	Webster *vs.* B. & P. R. R. Co.	24778	Apr. 25, '88	No ex. filed.	
	Tilghman *vs.* Linger	28108	Apr. 24, '88	May 10, '88	About 1 month.
	Hill *vs.* Evening Critic	26077	Dec. 7, '87	May 1, '88	About 5 months.
	Watson *vs.* Inland & S. C. Co.	25030	Apr. 20, '88	May 12, '88	About 1 month.
	Moses *vs.* Whyte	27995	Apr. 20, '88		
	Loeber *vs.* Moore	17756	M'ch 8, '79		
	Gawler *vs.* Ghiselli	27050	May 3, '88	No ex.	
48					
	Schneider *vs.* Keyser	22896	Feb. 8, '88	May 10, '88	About 3 months.
	Jones *vs.* B. & O. R. R. Co.	23492	Feb. 16, '88	May 11, '88	About 3 months.
	Bigger *vs.* Butterfield	26027	M'ch 15, '88	May 12, '88	About 2 months.
	Eberly *vs.* Behrend	28416	May 17, '88	Oct. 9, '88	About 5 months.
	Anderson *vs.* B. & P. R R. Co.	27198	June 7, '88	M'ch 26, '89	About 9½ mos.
	Caldwell *vs.* B. & P. R. R. Co.	26606	June 5, '88	M'ch 26, '89	About 9½ mos.
	Bowie *vs.* Hume	25587	May 25, '88	No ex.	
	Butler *vs.* Joyce	27558	May 25, '88	July 13, '88	About 1½ mos.
	Boteler *vs.* Dexter	27884	June 2, '88	June 14, '88	About 1½ mos.
	Peter *vs.* Leonard	26663	Issues from probate.		
	Pitt *vs.* Davis	27656	M'ch 22, '88	June 16, '88	About 3 months.
49	Sheehy *vs.* B. & P. R. R. Co.	27769	May 31, '88	Oct. 10, '88	About 4½ mos.
	Patten *vs.* Fleming	28509			
	Goldsmith *vs.* Ladson	28181	June 13, '88	July 13, '88	1 month.
	Williams *vs.* Luckett	27177	June 26, '88	July 18, '88	About 1 month.
	Am. Cloak & Suit Co. *vs.* Saks.	28345	July 2, '88	Oct. 12, '88	About 3 months.
	McPherson *vs.* Dist. of Col.	27514	Feb. 6, '88	July 13, '88	About 5 months.
	Chesley *vs.* Riley	28590	July 7, '88		
	Lyon & Co. *vs.* Riley	28591	July 7, '88		
	Dye *vs.* Va. M. R. R. Co.	27694	June 23, '88	Apr. 20, '89	About 10 months.
	McCarthy *vs.* Nat'l Savings Bank.	27665	May 28, '88		
	Reid *vs.* Anderson	27404	June 29, '88	Aug. 6, 88	About 1½ mos.
50					
	Johnson *vs.* Dist. of Col.	26208	Jan. 4, '86	M'ch 30, '86	About 1½ months.

List of Law Causes on Appeal, &c.—Continued.

Title of causes.	No. at law.	Date of judgt.	Date of filing bill of ex'ns.	Remarks.
U. S. *ex rel.*, etc., *vs.* Webb *et al.*	28907			
United States *vs.* Willson	28771			
Nicholson *vs.* Dist. of Col.	27928			
Crown *vs.* Dist. of Col.	27943			
Koones *vs.* Cook	26193	Nov. 1, '88	No ex.	
Prather *vs.* Lusby	28884	Nov. 17, '88		
Lulley *vs.* Morgan	28758	Nov. 26, '88		
Ayer *vs.* Col. R. R. Co.	26570	Nov. 23, '88	Apr. 6, '89	About 4½ mos.
Garner *vs.* Fenwick	28327	July 6, '88		
Gray *vs.* McCulley	28955	Jan. 26, '89		
51 Bunyea *vs.* Met. R. R. Co.	26852	Feb. 15, '89		
Coyle *vs.* Hill	28827	M'ch 20, '89	Apr. 6, '89	About 16 days.
Potts *vs.* Wash. Nat. B. B. Club.	28581	M'ch 11, '89	Apr. 15, '89	About 1 month.
Bantam *vs.* B. & O. R. R. Co.	28666	M'ch 15, '89		
Nilson *vs.* Hazen	28692	Apr. 3, '89	May 7, '89	About 1 month.
First Nat'l Bank *vs.* Hazen.	28693	Apr. 3, '89		
Sypher *vs.* Wilson	28790	M'ch 26, '89		
White *vs.* Herdic Phaeton Co.	26999	M'ch 21, '89	No ex. filed.	
Williams *vs.* Reed	28372	Feb. 13, 89	Apr. 18, 89	About 2 months.

DISTRICT OF COLUMBIA, *ss:*

Arthur W. Ferguson, being first duly sworn, says that he is a member of the bar of the supreme court of the District of Columbia, and that he examined the records of said court and prepared the foregoing statement therefrom, and that he believes that said statement is accurate.

ARTHUR W. FERGUSON.

Subscribed and sworn to before me this 28th day of May, 1889.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

52 *Affidavit of W. Herbert Smith. Filed June* 1, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EXECUTRIX *vs.* FRANK HUME. } At Law. No. 25587.

William Herbert Smith, being first duly sworn, deposes and says—

That he is a member of the bar of the supreme court of the District of Columbia and is the same W. H. Smith referred to in the

affidavit of Sidney T. Thomas filed in the above-entitled cause in opposition to the motion for a new trial; that he assisted, as reporter, the counsel for the plaintiff in the preparation of the bill of exceptions in the above-entitled cause, and when it was finished he carried the same, at the request of counsel for the plaintiff, to the office of Andrew C. Bradley, who was at that time one of the counsel for the defendant in said cause, and delivered the same to him; that he was no independent recollection as to the date of said delivery, but from a memorandum in pencil upon said bill of exceptions he believes it was delivered on or about the 30th of October, 1888; that some time thereafter, and affiant cannot fix the date, he happened to be in the office of Mr. S. T. Thomas, who was also one of the counsel for defendant in the above-entitled cause, on business connected with another case in which he had been engaged, and that said Thomas thereupon informed him that he had examined the bill of exceptions in the above-entitled cause, which had been handed to him by Mr. Bradley, of defendant's counsel; that he did not call at the office of said Thomas for said bill of exceptions at the request of Enoch Totten, Esq., one of plaintiff's counsel; that on this occasion said Thomas told affiant that Mr. Bradley had made a few suggestions as to alterations in the record, and that he (Thomas) had made some suggestions as to slight changes, and that said changes had been noted in lead
53 pencil on the margin of the record, and that he desired affiant to call the attention of Mr. Totten to said alterations to see if he would agree to them; that affiant carried the said bill of exceptions to Mr. Totten and called his attention to said suggestions and changes, to some of which Mr. Totten agreed and as to others he dissented; that when affiant presented said bill of exceptions to Mr. Totten he wrote in lead pencil the word "no" in the presence of affiant opposite to the only change to which he objected made by the defendant's counsel in the statement of the plaintiff's case, which said alteration consisted in limiting him to a specified reason or ground of objection as to the admissibility of certain evidence; that affiant has no recollection whatever that said Thomas ever told him the bill of exceptions might be presented to Justice Merrick for his signature if counsel for the plaintiff would agree to the proposed changes, and did not so notify plaintiff's counsel; that thereafter and within a short time affiant returned the said bill of exceptions to the said Thomas, and told him that Mr. Totten had agreed to certain changes desired, but would not agree to certain other changes proposed by defendant's counsel; that he has no recollection of having made any statement to defendant's counsel in regard to the testimony of the plaintiff himself or the statement thereof in the bill of exceptions, but, on the contrary, his positive recollection is, and the same has been refreshed by a reference to the record, that there was no change desired in the statement of the testimony of the plaintiff, and that the only question was in regard to the wording of an objection and exception to said testimony; that said Thomas thereupon stated to affiant that he desired to have Mr. Davidge, one of the counsel for the defendant, examine the said bill of excep-

tions; that affiant has no recollection of any request being made to him to notify counsel for the plaintiff that they must appeal to the court to settle the bill of exceptions, because it was plain counsel could not agree as to what it should contain, and that, as a
54 matter of fact, he never did so notify the plaintiff's counsel; that affiant was not acting for Mr. Totten in the matter except to deliver the said bill of exceptions, as a matter of accommodation to Mr. Totten, to the said Thomas.

WILLIAM HERBERT SMITH.

Subscribed and sworn to before me this 7th day of June, A. D. 1889.

[SEAL.] HARVEY S. W. DE GAW,
Notary Public.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the second Monday, it being the 13th day, of May, A. D. 1889.

MONDAY, *May 13th, A. D.* 1889.

By order of Chief Justice Edward F. Bingham, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

SATURDAY, *June* 8, *A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

WILLIAM B. BOWIE'S EX'X, Plaintiff,
vs.
FRANK HUME. } 25587. At Law.

At the request of both parties, by their respective attorneys, the court orders the plaintiff's motion for a new trial, filed in this cause April 23, 1889, be heard in the general term in the first instance.

55 *Motion to Substitute. Filed January* 6, 1891.

In the Supreme Court of the District of Columbia, in General Term, January Term, 1891.

BOWIE'S EXECUTRIX, &c.,
vs.
FRANK HUME. } Law. No. 25587.

Motion to substitute legal representatives.

And now comes Richard Irving Bowie and suggests the death of Annie H. Bowie, executrix of the last will of William B. Bowie, deceased, and presents a duly authenticated copy of letters of administration *de bonis non cum testamento annexo* issued to him by the

proper court of the State of Maryland, and thereon moves the court to admit him as a party plaintiff to prosecute the said cause of action instead of said executrix, so deceased as aforesaid, and the same is allowed.

——— ———,
Attorney for Adm'r.

Letters of Administration. Filed January 6, 1891.

MARYLAND, *sct:*

I, Charles Clagett, chief judge of the orphans' court of Prince George's county, in the State aforesaid, do certify that the aforegoing attestation of J. Benson Perrie, register of wills for said county, is in due form and by the proper officer.

Given under my hand, at the town of Upper Marlborough, this second day of January, in the year of our Lord one thousand eight hundred and ninety-one.

CHAS. CLAGETT,
Chief Judge.

56 STATE OF MARYLAND, *sct:*

I, J. Benson Perrie, register of wills for Prince George's county, in the State aforesaid, do certify that Charles Clagett, Esquire whose genuine signature is attached to the aforegoing certificate, is and was at the time of signing the same chief judge of the orphans' court of said county, duly commissioned and qualified.

In testimony whereof I hereunto subscribe my name and affix the seal of the orphans' court aforesaid this second day of January, A. D. 1891.

[SEAL.] J. BENSON PERRIE,
Register of Wills.

THE STATE OF MARYLAND, *Prince George's County,* } *sct:*

The subscriber, register of wills for Prince George's county, doth hereby certify that it appears by the records in his office that letters of administration *de bonis non cum testamento annexo* of all the goods, chattels, credits, and personal estate of William B. Bowie, deceased, were, on the 13th day of December, in the year of our Lord one thousand eight hundred and ninety, granted and committed unto Richmond Irving Bowie, who was then and there appointed administrator of the said deceased.

In testimony whereof I hereunto subscribe my name and affix the seal of the orphans' court of said county this second day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Test:

[SEAL.] J. BENSON PERRIE,
Register of Wills for Prince George's County.

57 MONDAY, *April 4th*, 1892.

Proceedings before the supreme court of the District of Columbia sitting in general term, beginning the first Monday, April 4th, 1892.

Present, presiding: Chief Justice Bingham and Jutices James. Mr. Justice Cox absent, unwell.

* * * * * * *

TUESDAY, *April* 26, 1892.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Justices Cox and James.

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WILLIAM B. BOWIE'S EX'X. *vs.* FRANK HUME. } 25587. Law. No. 14. Jan'y, '92, Calendar.

The motion of the plaintiff to set aside the verdict and judgment and to grant a new trial in this case because the bills of exception containing the exceptions reserved on the trial could not be settled, signed, and sealed as required by law, the justice of the court who presided at the trial (in division No. 2, May term, 1888, of this court) having departed this life without having settled or sealed or signed the same, came on to be heard and, the plaintiff being deceased, was argued in behalf of R. Irving Bowie, administrator *de bonis non c. t. a.* of Wm. B. Bowie, deceased, and submitted. It is this 26th day of April, 1892, considered, adjudged, and ordered that the said motion be granted and the judgment and verdict set aside accordingly and a new trial granted the plaintiff.

By the court:

E. F. BINGHAM.

Order and judgment excepted to by defendant.
(Signed) S. T. THOMAS, *Of Counsel.*

58 *Bill of Exceptions. Filed June* 7, 1892.

In the Supreme Court of the District of Columbia, in General Term, April, 1892.

WILLIAM B. BOWIE'S EXECUTRIX, Plaintiff, *vs.* FRANK HUME, Defendant. } At Law. No. 25587.

Bill of exceptions.

On the 26 day of April, 1892, at the hearing of the motion filed in this cause by Anna H. Bowie, executrix of William B. Bowie, deceased, on the 23rd day of April, 1889, to vacate the judgment and verdict therein on the 25th day of May, 1888, rendered and recovered against William B. Bowie, her testator, in favor of the de-

fendant, which motion on the 8th day of June, 1889, was ordered to be heard in the general term in the first instance, there was read to the court in support of said motion two certificates of R. J. Meigs and three affidavits hereto annexed, marked A, B, C, D, hereby made part of this bill of exceptions; and the defendant in resistance and against the allowance of the said motion thereupon read to the court the certificate of R. J. Meigs, clerk, and of Dorsey Clagett, register of wills, and the three certain affidavits hereto annexed, marked F, G, H, I, and J, and hereby made part of this bill of exceptions.

And the only evidence offered by the plaintiff or by the defendant or heard or considered by the court upon the hearing of the said motion or in connection therewith were the said certificates and affidavits so marked as aforesaid.

And upon the said motion and upon the certificates and affidavits and upon them alone the court, on the 26th day of April, 1892, after argument as well on behalf of R. Irving Bowie, administrator *de bonis non c. t. a.* of William B. Bowie, deceased, in support of
59 the said motion as on behalf of the defendant in resistance thereof, granted the said motion and ordered and directed that the said judgment so by the defendant recovered against Wm. B. Bowie on the 25th day of May, 1888, be vacated and set aside and a new trial granted in the words and figures following, to wit:

"In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EXECUTRIX, Plaintiff,
vs.
FRANK HUME, Defendant. } At Law. No. 25587.

The motion of the plaintiff to set aside the verdict and judgment and to grant a new trial in this cause because the bills of exceptions containing the exceptions reserved on the trial could not be settled, signed, and sealed, as required by law, the justice of the court who presided at the trial (in division No. 2, May term, 1888, of this court) having departed this life without having settled or sealed or signed the same, came on to be heard and, the plaintiff being deceased, was argued in behalf of R. Irving Bowie, administrator *de bonis non c. t. a.* of William B. Bowie, deceased, and submitted. It is this 26th day of April, 1892, considered, adjudged, and ordered that the said motion be granted, and the judgment and verdict are set aside accordingly and a new trial granted the plaintiff." And at the time the court granted the said motion and ordered and directed the said verdict and judgment to be vacated and set aside and a new trial to be granted to the plaintiff the defendant duly excepted to the said motion and to such order and judgment of the court, and prayed the court to seal and sign this his bill of exceptions, which is now done, during the term whereat the said motion was granted, and the said order and judgment were given accordingly on this 7th day of ——, 1892.

[SEAL.] E. F. BINGHAM, *C. J.*

60 EXHIBIT A.

In the Supreme Court of the District of Columbia.

Filed April 23, 1889. R. J. Meigs, clerk.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

Affidavit in Support of the Motion for a New Trial in the Above-Entitled Cause.

DISTRICT OF COLUMBIA, *ss:*

I, Benjamin G. Lovejoy, being first duly sworn, do depose and say that I am one of the counsel of record for the plaintiff in the above-entitled cause, and that said cause came on for trial on the — day of May, 1888, in the division No. 2 of the circuit court, held by Mr. Justice Merrick, in pursuance of the orders of the general term of this court passed on the 3d day of January, 1888, and the 27th day of April, 1888, and that said trial resulted in a verdict and judgment on the 25th day of May, 1888, in favor of the defendant, and that the said court (division No. 2) ceased to try causes on the 14th day of July, 1888.

On the 28th day of May, 1888, a motion for a new trial, founded on the exceptions reserved during the said trial, was filed, which was entertained by the said justice holding said court and was by him afterwards and on the 2d day of June, 1888, by said court overruled, and from this decision an appeal to the general term was taken.

The said term of the said circuit court (division No. 2) was not then and never to this day has been finally or formally adjourned without day, and the records, entries, and minutes do not show that any such adjournment *sine die* has been made of the said term.

Division No. 1 of said circuit court was adjourned *sine die* on the
14th day of July, 1888, save and except as to those cases
61 therein wherein bills of exception were to be prepared, and as to those cases the court was prolonged for that purpose.

During the trial of the said cause as aforesaid numerous exceptions were taken to the rulings and instructions of the said court, which were before verdict entered upon the minutes of the said justice presiding at said trial, but the same were not reduced to writing at the time, and the trial was proceeded with upon the noting as aforesaid of the exception. On the 14th day of July, 1888, on which day the said division No. 2 of said circuit court ceased to try causes, an order was made by said court (division No. 2) and entered of record prolonging the said term of said court in order to give opportunity to prepare and settle a bill of exceptions in the said cause as well as in other causes tried in the said division of said court at said term.

It is and has for many years been the custom in this court to hold no trials of civil causes at law between about the middle of July and the month of October in each year, and the period including the latter part of the month of July, the whole of the month of August, and a part of the month of September in each year has usually been almost universally devoted to rest from professional labors or to a summer vacation by the bar and bench of the said supreme court of the District of Columbia.

Immediately after said "summer vacation" of 1888 counsel for the plaintiff in the above cause began the preparation of the formal bill of exceptions for the purpose of embodying the exceptions as aforesaid to the said rulings and instructions of the court during said trial, and on or about the 4th day of October, 1888, completed the same, and on that day tendered them to counsel of record for the defendant for the purpose of settling them by agreement of counsel. Two of said counsel promptly examined the said bill of exceptions, but retained the said bill of exceptions so tendered in order to give opportunity to the third counsel for defendant to examine them until the 23rd day of March, 1889, when the same were returned to counsel for the plaintiff.

62 About the 11th or 12th day of December, 1888, said presiding justice, the Hon. William M. Merrick, while sitting in general term of this court, being ill, left the court and never returned to it and never afterwards attended to any further official business, and on the — day of February, 1889, died, the said bill of exceptions never having been settled, signed, or made of record.

All the proceedings on the said trial were fully and carefully reported by an experienced and skillful stenographic reporter jointly employed by the parties to the cause, and his report thereof was soon after the trial written out and copied by means of a typewriter, and copies thereof were delivered to the parties and the same are now easily accessible.

The plaintiff in the said cause, William B. Bowie, also departed this life on the — day of December, 1888, and Annie H. Bowie, his widow, has been duly appointed and has qualified as the executrix of his last will and testament.

True copies of the following specified rules of the supreme court of the District of Columbia in force at the time of said trial and now in force and the following orders and entries forming parts of the judicial records of this court, duly certified by the clerk thereof, attested by the seal of this court, are hereto attached and reference is hereby made to the same as a part of this affidavit, to wit:

1. Rule No. 1, fixing the terms of this court.
2. Rule No. 61.
3. " " 62, relating to bills of exceptions.
4. " " 64.
5. Copy of the two orders of the general term of this court providing for two terms of the circuit court, to be called division No. 1 and division No. 2, dated January 3d, 1888, and April 27th, 1888.
6. Copy of the entry of verdict and judgment in this cause.

7. Copy of entry of order of July 14, 1888, extending the said term (division No. 2) for the purpose of giving opportunity
63 to prepare and settle bills of exceptions.

8. Copy of order prolonging circuit court No. 1 for the purpose of preparing and settling bills of exceptions.

9. Order of general term, dated January 24th, 1889, assigning justices to the different branches of the court for 1889.

BENJAMIN G. LOVEJOY.

DISTRICT OF COLUMBIA, *ss:*

Benjamin G. Lovejoy personally appeared before me, in my office, on the 22nd day of April, 1889, and made oath that he had read the foregoing affidavit by him subscribed, and that he knows the contents thereof, and that the same is true according to his best knowledge, information, and belief.

R. J. MEIGS, *Clerk,*
[SEAL.] By R. J. MEIGS, JR.,
Ass't Clerk.

EXHIBIT B.

In the Supreme Court of the District of Columbia.

WILLIAM B. BOWIE'S EXECUTRIX *vs.* FRANK HUME. } At Law. No. 25587.

Certificate of Clerk.

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the following rules of court, to wit, rules No. 2, No. 54, No. 61, No. 62, and No. 64, were in force in this court on the 1st day of May, 1888, and that they have ever since been and now are of force in said court.

Rule No. 2.

TERMS OF COURT.—The terms of the court shall be held as follows:

Of the general term on the—
4th Monday of January.
4th Monday of April.
1st Monday of October.
64 Of the circuit court on the—
4th Monday of January.
2nd Monday of May, which term shall not continue beyond the 2nd Saturday in July except to finish a pending trial.
Of the district court on the—
1st Monday of June.
1st Monday of December.
Of the criminal court on the—
1st Monday of March.

2nd Monday of June.
1st Monday of December.
Of the special terms on the 1st Tuesday of every month except August, in which month there shall be no term of court.

Rule 54.

Motions for new trial may be grounded on errors of law in the rulings of the justice presiding at the trial.

1. The motion may be made upon the bills of exception, in which case it must be filed in the circuit court, but shall be heard in the general term in the first instance.

2. The justice who tried the cause may, in his discretion, before any bills of exceptions are prepared, entertain a motion to set aside the verdict for errors of law founded on the exceptions reserved during the trial and noted on his minutes. An appeal may be taken from the decision of the justice on such motion, in which case a bill of exceptions must be settled in the usual manner.

Rule 61.

If a party desires to present for review in the general term the rulings or instructions of the presiding justice for alleged errors of law, he must at the trial and before verdict except to such rulings or instructions; and he may at the time of taking exception reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes and proceed with the trial and afterwards settle the bill of exceptions. (Rules S. C. D. C., p. 26.)

65

Rule 62.

The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it. (Rules S. C. D. C., p. 26.)

Rule 64.

In case the judge is unable to settle the bill of exceptions and counsel cannot settle it by agreement a new trial shall be granted. (Rules S. C. D. C., p. 27.)

And I further certify that the following orders and entries appear of record in this court, to wit:

Copy of Order of General Term Directing the Terms of the Circuit Court, Dated January 3rd, 1888.

TUESDAY, *January 3rd*, 1888.

Ordered further that in addition to the circuit court to be held by Justice Hagner on the fourth Monday of January, 1888, a second circuit court shall be held at the same time by Justice Merrick in

the western audience-room of the south front of the court-house, the court to be held by Justice Hagner to be known as division No. 1 and the court to be held by Justice Merrick to be known as division No. 2.

The cases on the first half of the calendar shall be tried in division No. 2 and the cases on the last half of the calendar shall be tried in division No. 1.

The first twenty-six jurors drawn for service in said courts shall serve in division No. 1 and the 26 persons next drawn shall serve in division No. 2.

Copy of Order of General Term Continuing said Two Terms, Dated April 27, 1888.

Ordered that the circuit courts now being held in division No. 1 and 2 be continued further in same order by same justices through May term thereof.

66 *Copy of Entry of Verdict and Judgment in This Court.*

FRIDAY, *May 25th*, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice W. M. Merrick.

WM. B. BOWIE
vs.
FRANK HUME. } 25587. Law. Cal. 19.

Now come again the parties aforesaid in manner and form aforesaid and the same jury respited yesterday, who on their oath say they find for the defendant. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff $— for his costs of suit and have his execution thereof.

Copy of Order Prolonging Term of Division No. 2, of Order *July 14th*, 1888.

SATURDAY, *July* 14, 1888.

Session resumed pursuant to adjournment.
Present, presiding: Mr. Justice Wm. M. Merrick.

* * * * * * *

By order of the court the May term of the circuit —, division No. 2, is hereby entered as extended that the bills of exceptions not yet filed may be settled, to wit:

* * * * * * *

BOWIE
vs.
HUME. } 25578. At Law.

* * * * * * *

Copy of Order of General Term of Division No. 1, of Date July 14, 1888.

Division No. 1.

JULY 14TH, 1888.

The court orders the term of this court extended for the purpose of settling bills of exceptions and case in the following cases * * * (cases named); and thereupon the May term adjourned without day except as above stated.

67 *Copy of Order of General Term, January 24, 1889, Assigning Justices.*

THURSDAY, *January 24th*, 1889.

Session resumed pursuant to adjournment.

Present, presiding: Mr. Chief Justice Bingham, Hagner, and James.

Assignment of Justices for 1889.

Ordered that the assignment of justices to serve in the supreme court of the District of Columbia for the year 1889 be as follows:

First, for the general term, Justices Hagner, James, and Merrick; second, for the circuit court, Chief Justice Bingham; third, for the equity court and orphans' court, Justice Cox; fourth, for the district court, Justice James; fifth, for the criminal court, Justice Montgomery.

Witness my hand and the seal of said court this 5th day of April, 1889.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Ass't Clerk.

In the Supreme Court of the District of Columbia, May Term, Circuit Court, Division No. 2, Prolonged.

Filed April 23, 1889. R. J. Meigs, clerk.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } Law. No. 25587.

Notice of Motion to Set Aside Verdict.

Please take notice that on Saturday, the 27th day of April, 1889, at the opening of the court on that day or as soon thereafter as coun-

sel can be heard, we shall move the court to set aside the verdict and grant a new trial in this cause for the reasons stated in the motion on file. The motion will be based upon the files and rec-
68 ords of this court and the affidavit now on file herein with the said motion.

ENOCH TOTTEN,
BENJ. G. LOVEJOY,
For Pl'ffs.

To W. D. Davidge, S. T. Thomas, for def't.

Service of copy ack. Ap. 23, 1889.

S. T. THOMAS.

In the Supreme Court of the District of Columbia.

Filed May 10, 1889. R. J. Meigs, clerk.

BOWIE'S EX'R
vs.
FRANK HUME. } At Law. No. 25587.

Notice that Motion Will Be Called up to Set Aside Verdict and Judgment and to Get a New Trial.

Please take notice that on Tuesday next, the 14th day of May, 1889, at the opening of court (Chief Justice Bingham) on that day or as soon thereafter as counsel can be heard, I shall call up the motion in the above cause now on file to set aside the verdict and judgment and to get a new trial.

This motion will be called up before Bingham, C. J., holding the circuit court.

ENOCH TOTTEN,
B. G. LOVEJOY,
Att'ys for Pl'ff.

To W. D. Davidge, S. T. Thomas.

Copy rec'd May 10, 1889.

S. T. THOMAS.

69 EXHIBIT F.

In the Supreme Court of the District of Columbia.

Filed May 25, 1889. R. J. Meigs, clerk.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

Affidavit in Opposition to Motion for a New Trial in the Above Entitled Cause.

Sidney T. Thomas, having been first duly sworn, deposes and says that he is one of the counsel for the defendant in the above-

entitled cause and was such counsel, though not of record, when the cause was tried and took part in the trial thereof.

Affiant has been a member of the bar of this court for about fifteen years, and he denies that during that time it has been the custom of the bench and bar of the supreme court of the District of Columbia to cease their labors from the middle of July to the first of October and enter upon their "summer vacation;" on the contrary, a special term of said court in equity sits every month in the year except August, and the orphans' court is held weekly every month in the year and a great volume of equity and orphans' court business is transacted during the months of July and September, which requires the presence of at least one of the justices of said court and the bar generally. Moreover, affiant has a general recollecton that both the counsel for the plaintiff in this cause were in this city nearly all the time between the 25th day of May, 1888, and the 4th day of October, in that year, and he does not believe that either of said counsel was absent from the city for two weeks at a time during that period. Especially is this so of Mr. Lovejoy.

Affiant further says that he received a draft of a bill of exceptions in this cause, prepared by the plaintiff's counsel, from Mr. A. C. Bradley (now one of the justices of the supreme court of the District of Columbia), who was originally of counsel for the defendant, on or about the 1st day of November, 1888, and at once pro-
70 ceeded to examine the same; that about the 15th day of November, 1888, having finished his labors, he handed the document to Mr. W. H. Smith, the stenographer who reported the trial of the case and who called for it at the request of Enoch Totten, Esq., one of the plaintiff's counsel, saying to him (Mr. Smith) that counsel for the defendant had noted in lead pencil on the margin the changes they desired made in the statement of the evidence in the cause, and that if counsel for the plaintiff would agree to the proposed changes the bill might be presented to Justice Merrick, who tried the cause, for his signature; that Smith took said proposed bill away from him for Mr. Totten and returned with it in a week or ten days, saying that the plaintiff's counsel had agreed to certain of the changes desired by the defendant's counsel, *but would not agree to certain of the changes desired by the defendant's counsel*, but would not agree to certain other changes proposed by the defendant's counsel, especially those in regard to the statement of the testimony of the plaintiff himself. Affiant then requested the said Smith, who was acting for Mr. Totten in the matter and who occupied the same office with him, to notify the counsel for the plaintiff that they must appeal to the court to settle the bill of exceptions, because it was plain counsel could not agree as to what it should contain. When this occurred Justice Merrick, who tried the cause, was still on the bench and attending to his duties, which he continued to discharge until the 14th day of December, 1888, when, owing to illness, he left the court-house and did not again return to it; that Justice Merrick resided at 1716 N street N. W., in Washington, D. C., from the time of said trial to his death,

which occurred about the 6th of February, 1889, but was not too ill for a month after he left the bench, as affiant is informed and believes, to have settled the bill of exceptions at his house if the same had been presented to him. Affiant and his colleagues were ready at all times to have attended to the matter and would readily have gone to the justice's house if they had been summoned by the
71 justice or even been requested by the plaintiff's counsel to settle the bill of exceptions, but nothing was said or done by the counsel for the plaintiff after the proposed bill of exceptions was returned to affiant as aforesaid, and, the plaintiff having died some time in December, 1888, and no steps having been taken in this court until April 8, 1889, to revive the cause, affiant supposed the suit was abandoned.

Affiant further says that the proposed bill of exceptions was allowed by the plaintiff's counsel to remain in affiant's office from the time Smith left it there until about the 23rd day of March, 1889, when affiant handed it to Mr. Totten, at his request, in affiant's office, this being the first time the plaintiff's counsel had alluded to the case after December 1, 1888, although affiant had notified Mr. Totten through Mr. Smith when he left the proposed bill that counsel for the defendant could not agree with counsel for the plaintiff as to the statement of the evidence in the proposed bill of exceptions, and an appeal would have to be taken to the justice who tried the cause to settle the same. Affiant further says he was ready and willing at all times after the 1st of December, 1888, to have delivered the proposed bill of exceptions to the counsel for the plaintiff if they had only called or sent for the same; that he had no use for it and had finished his examination of it by December 1, 1888, and he denies that after that time the proposed bill of exceptions was retained by him until March 23, 1889, in order to give the "third counsel" for the defendant an opportunity to examine the same. On the contrary, he says the said "third counsel" (Mr. W. D. Davidge), several days before the 1st of December, 1888, had said to affiant that he did not wish to examine the bill of exceptions; that he left that matter to Mr. Bradley and affiant.

S. T. THOMAS.

Subscribed and sworn to before me this 17th day of May, A. D. 1889.

[SEAL.] HOWARD M. NORRIS,
Notary Public.

72 EXHIBIT G.

In the Supreme Court of the District of Columbia.

Filed May 25, 1889. R. J. Meigs, clerk.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

Affidavit of A. C. Bradley in Opposition to Pl'ff's Motion for a New Trial.

Andrew C. Bradley, being duly sworn, says that he was one of the attorneys for the defendant in the trial of the above-entitled cause, in which the verdict was rendered and judgment thereon entered May 25, 1888; that early in the month of October next the plaintiff's present bill of exceptions was left in affiant's office for examination; that such examination was made by affiant in the latter part of that month or the first part of November. Some suggested amendments were noted thereon in pencil and the bill of exceptions then, in the first part of November, as well as affiant can now recollect, was handed to Mr. Sidney T. Thomas for examination by him. Later in that month affiant was informed by Mr. Thomas that Mr. W. D. Davidge, attorney of record for defendant, was satisfied to have the bill of exceptions signed by the court, provided the amendments suggested by affiant and by Mr. Thomas should be made, and with affiant's assent he believes that said bill of exceptions was forthwith delivered to the attorney of the plaintiff with such information; that thereafter affiant was informed that counsel for plaintiff had agreed to make the suggested corrections, except in one or two particulars, which counsel for defendant insisted upon, and counsel for plaintiff were informed that the court must settle these points unless they agreed to them, which they declined to do; that this was prior to the time when Mr. Justice Merrick was taken sick; that affiant, as he now recollects, after Justice Merrick was taken sick, more than once urged upon Mr. Lovejoy, one of plaintiff's attorneys, the importance of having this matter attended to before Justice Merrick should be incapacitated by illness; that affiant was willing to attend before Justice Merrick at any time for that purpose, but nothing was done nor was there any proposition made to affiant to attend before Justice Merrick to settle said bill of exceptions.

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That after the death of Justice Merrick and prior to the appointment of affiant as his successor affiant does not recall anything as having been said by attorneys for plaintiff to him in reference to such matter.

A. C. BRADLEY.

Subscribed and sworn to before me this 10th day of May, A. D. 1889.

[SEAL.] ALBERT HARPER,
Notary Public.

EXHIBIT H.

In the Supreme Court of the District of Columbia.

Filed May 25, 1889. R. J. Meigs, clerk.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

Personally appeared Frank Hume, who, having been first duly sworn, deposes and says that he is the defendant in the above-entitled cause, and that immediately after the trial thereof in May, 1888, he urged upon his attorneys, Messrs. W. D. Davidge, A. C. Bradley, and S. T. Thomas, the importance to him of having the bill of exceptions in this case settled and signed by Justice Merrick as soon as possible after the trial, and that on several occasions prior to the illness of Justice Merrick he requested his counsel to see the plaintiff's counsel and ask them not to further delay the preparation of their bill of exceptions. Affiant further says that Mr. Bradley and Mr. Thomas, of his counsel, from time to time until the death of Justice Merrick, informed him in response to his inquiries
74 that they had spoken to the plaintiff's attorney- about the bill of exceptions, reminding them more than once that their client, Mr. Bowie, was an old man, he being then upwards of seventy years of age, and that his death before this cause was finally closed might place affiant at great disadvantage. Affiant further says that on two of his counsel, viz., Mr. Bradley and Mr. Thomas, devolved the duty of attending to the bill of exceptions, so far as he was concerned, Mr. Davidge, affiant's other attorney, having informed him very soon after the trial that he expected them to attend to that matter. Affiant further says that Justice Merrick, who resided in Washington (at 1716 N street N. W.), had a country place near Ellicott City, Maryland, where he usually went to spend the summer months; that, as affiant is informed and believes, Justice Merrick usually retired to his place in the country about the first of June, returning to his Washington residence about the first of October, but that the justice's summer residence near Ellicott City did not interfere with the discharge of his official duties in Washington; on the contrary, he came to the city almost every day and held court right along, as though he resided in Washington; that Justice Merrick, as affiant is informed and believes, was in Washington almost daily during the month of July, 1888; that he held the orphans' court every week during the month of August, 1888, as appears by the certificate of the register of wills, herewith filed, and that he was in Washington two or three times a week during the month of September, 1888, and returned to his Washington residence the first of October, 1888, taking his place in the general term of said court; that it was only necessary, as affiant is informed and believes, for those having business with

Justice Merrick while he was in the country to have notified him by mail or telegraph and he would have promptly responded. Affiant further says he is informed and believes that the plaintiff's attorneys in this cause are at fault in not having the bill of exceptions ready before the first of October; that the trial was stenographically reported by a competent and skillful reporter, Mr. W. H. Smith, employed by the plaintiff; that the stenographer's notes were transcribed and
75 written out on a typewriter in duplicate each day as the trial progressed and a copy furnished each side, which, as affiant is informed and believes, did much to lessen and simplify the labors of counsel in preparing the bill of exceptions; that under these conditions and the fact—for affiant is informed and believes it is a fact—that not only the justice who tried the case was practically in Washington all summer and the plaintiff's — were absent from the city very little of that time, affiant says he is advised and believes that it is the fault of said counsel that the bill of exceptions in this case was not signed and sealed in due season. Affiant further says he is informed and believes that his counsel, immediately on the plaintiff's counsel submitting to them the draft of their proposed bill of exceptions, proceeded to examine the same and finish- their labors about the 20th of November, 1888, and notified the plaintiff's counsel that unless certain changes they desired made in the statement of the testimony of several of the witnesses who testified in the cause, especially that of the plaintiff (Bowie) himself (the proposed changes being noted in lead pencil on the margin of the pages of the bill where the objections occurred), were made an appeal would have to be made to the court to settle the bill, as provided by the rules of the court; that at this time Justice Merrick, who tried the cause, had returned to Washington and was attending to his official duties; that notwithstanding this notice to the plaintiff's counsel that affiant's counsel could not agree with them as to what the bill of exceptions should contain and that it would be necessary therefore to present the matter to Justice Merrick, affiant is informed and believes that the plaintiff's counsel allowed the matter to stand without any action until about the 23rd day of March, 1889, after the death of the justice who tried the cause, when, affiant is informed, one of the counsel for the plaintiff, Mr. Enoch Totten, called on Mr. Thomas, one of affiant's counsel, and received the draft of the bill of exceptions left with that gentleman in November, 1888, although affiant has been informed by Mr. Bradley, the successor of Justice
76 Merrick and formerly one of affiant's counsel, that when Justice Merrick was ailing and it looked as though he might get very ill that he (Bradley) cautioned Mr. Lovejoy, of the plaintiff's counsel, to have the bill of exceptions settled before the justice got too ill to do it; but no effort was made by the plaintiff's counsel, as affiant is informed and believes, to have Justice Merrick settle the bill at his house, although, as affiant is informed and believes, his ailment did not incapacitate him from acting upon the bill until toward the latter part of January, 1889. Affiant is informed

by his counsel that they were ready and willing at all times to have attended before the justice, either at chambers or at his house, to settle the bill of exceptions, but that they were never requested by the plaintiff's attorney so to do. Affiant further says he is informed and believes the difference between his counsel and the counsel for the plaintiff over said bill of exceptions was not very great and related almost entirely to the statement of the testimony of the plaintiff himself, and the said objection could readily have been removed by substituting literally the testimony of the plaintiff on the point or, for that matter, his entire testimony as reported by the stenographer, which he is advised by his counsel they proposed to the plaintiff's counsel to do.

Affiant further says that he is advised by his counsel that the death of the plaintiff in this action may place him, in the event of a new trial, at a great disadvantage; that it is extremely doubtful whether on a retrial of the case affiant could testify in his own behalf unless called as a witness by the plaintiff or required by the court to testify, and he might thus be deprived of the privilege, through no fault of his own, of giving his testimony, which he is advised is of the first importance to his defense; that but for the fact that his testimony may be inadmissible on a retrial affiant would readily agree that the successor of Justice Merrick or any other member of the court might sign the bill; but in view of the laches of the counsel for the plaintiff in failing to place their bill of
77 exceptions in the hands of Justice Merrick for settlement, as he is informed and believes by the 63d rule of this court it was their duty to do after they had been notified by affiant's counsel that they could not settle the bill by agreement, and especially in view of the death of the plaintiff since the trial, which, as before stated, he is advised by his counsel may place him at very great disadvantage, if there is to be a new trial affiant objects to the granting of the present motion, but agrees, so far as he is able to agree, that substituting in the bill of exceptions the entire testimony of the former plaintiff, William B. Bowie, in lieu of the statement of it contained in the proposed bill of exceptions the bill of exceptions may be signed by any member of said court in the place of Justice Merrick, who tried the cause, provided in the event of a retrial the testimony of both affiant and William B. Bowie, the former plaintiff, may be read in evidence to the jury.

FRANK HUME.

Subscribed and sworn to before me this 25th day of May, A. D. 1889.

ALBERT HARPER,
Notary Public.

[SEAL.]

EXHIBIT I.

In the Supreme Court of the District of Columbia.

Filed May 25, 1885. R. J. Meigs, clerk.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

Certificate of Dorsey Clagett, register of wills, etc., that Judge Merrick held orphans' court during the month of August, 1888.

I, Dorsey Clagett, do hereby certify that I am register of wills of the District of Columbia and was such register during the entire month of August, 1888.

78 I further certify that it appears from the records in my office (Proceedings No 19) that William M. Merrick, late one of the justices of said court, held a special term of said court for probate and orphans' court business on the 6th, 8th, 10th, 13th, 20th, 22nd, and 30th days of August, 1888.

Witness my hand and the seal of said court for orphans' court business this 15th day of May, A. D. 1889.

DORSEY CLAGETT,
Register of Wills, D. C.

[SEAL.]

EXHIBIT J.

In the Supreme Court of the District of Columbia.

Filed May 25, 1888. R. J. Meigs, clerk.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME. } At Law. No. 25587.

Certificate of R. J. Meigs as to Adjournment of October Term, 1888, of Circuit.

I, R. J. Meigs, clerk of said court, do hereby certify that the following is a true copy of the order adjourning the October term, 1888, of the circuit court of the supreme court of the District of Columbia passed by Mr. Justice Hagner the 26th day of January, 1889, as the same is recorded in Minutes 23, page 420, of said court, viz:

"The court orders the term of the court extended to settle bills of exceptions or case in cases tried at this term of the court; and thereupon the October term of this court is adjourned without day except as above."

Witness my hand and the seal of said court this 15th day of May, A. D. 1889.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

[SEAL.]

79 EXHIBIT C.

In the Supreme Court of the District of Columbia.

Filed May 28, 1889. R. J. Meigs, clerk.

BOWIE'S EXECUTRIX *vs.* HUME. } Law. No. 25587.

Affidavit of A. W. Ferguson.

List of law cases on appeal to the general term supreme court District of Columbia on the calendar of that court for April term, 1889, showing the dates of the several judgments and the time of filing the bills of exceptions in each case.

Title of cause.	No. at law.	Date of judgt.	Date of filing ex.	Remarks.
Nat'l B'k Rep'lic *vs.* Bigelow.	23778	June 3, '85		
Thayer *vs* Duncanson	24839	July 2, '86	Oct. 5, '86	About 3 mos.
Dist. Col. *vs.* Johnson	19485	Nov. 15, '86	M'ch 5, '87	About 4 mos.
Fitzgerald *vs.* B. & P. R. R. Co.	24699	Dec. 14, '86	Feb. 26, '87	About 2½ m.
Cochran *vs.* Hume	25408	Feb. 16, '87	July 8, '87	About 5 mos.
Bryan *vs.* Duncan	26843	Feb. 19, '87	None.	
80 Smith *vs.* May	21741			
Mustin *vs.* Lowe	28085	Never	appealed.	
Harmon *vs.* W. & G. R. R. Co.	24010	Dec. 1, '87	Jan. 21, '88	About 1½ mos.
Dist. of Col. *vs.* Wash. G. L't Co.	22757	M'ch 14, '87	Jan. 23, '88	About 10 mos.
Johnson *vs.* Johnson	26258	Jan. 28, '88	May 28, '88	About 4 mos.
Githens *vs.* Berlin	26553	Jan. 28, '88	May 28, '88	About 4 mos.
McGill *vs.* Wheeler	26477	Apr. 23, '88	May 24, '88	About 1 mo.
Wright *vs.* Dearing	25467	Dec. 12, '87	May 3, '88	About 5 mos.
Fowler *vs.* Saks	26486	Feb. 8, '88	Apr. 25, '88	About 2 mos.
Barnard, rec'r, *vs.* Jones	14064	July 21, '75		
Justh *vs.* Wilson	27550	Jan. 26, '88	May 10, '88	About 4 mos.
81				
McIntire *vs.* McIntire	26788	Feb. 11, '88		
McCann *vs.* B. & O. R. R. Co.	26490	Feb. 24, '88	May 23, '88	About 3 months.
Williams *vs.* Roney	27768	M'ch 7, '88	Apr. 27, '88	About 1½ mos.
U. S., use Davis, *vs.* Henderson.	25959	Appeal on	demurrer.	
Burgdorf *vs.* Cingria	26333 and 26334	M'ch 1, '88	May 15, '88	About 2½ mos.
Burgdorf *vs.* Davis	26335	M'ch 1, '88	No ex.	
Neale *vs.* Lee	26753	M'ch 9, '88	May 16, '88	About 2 mos.
Wright *vs.* Lee	26754	M'ch 13, '88	May 16, '88	About 2 mos.
Baier *vs.* Cornwell	27429	Feb. 2, '88	May 8, '88	About 2 mos.
Prindle *vs.* Campbell	26535	Feb. 23, '88	June 9, '88	About 3½ mos.
Woodsey *vs.* B. & P. R. R. Co.	26927	M'ch 16, '88	May 10, '88	About 2 mos.

List of Law Causes on Appeal, &c.—Continued.

Title of cause.	No. at law.	Date of judgt.	Date of filing ex.	Remarks.
82				
Ketcham *vs.* Bramhall	27475	M'ch 21, '88	July 6, '88	About 3½ months.
Johnson *vs.* B. & P. R. R. Co.	25497	Apr. 12, '87	May 31, '87	About 1½ mos.
Sanders *vs.* Wilson	28057	Apr. 4, '88		
Pitney & B. *vs.* Chapman	27633	Apr. 9, '88	May 24, '88	About 1½ mos.
Viedt *vs.* Evening Star	28421	M'ch 31, '88		
Humphrey *vs.* Herdic Co.	27097	Apr. 9, '88	May 11, '88	About 1 month.
Fay *vs.* Auglim	26970	Apr. 5, '88	May 10, '88	About 1 month.
Manning *vs.* Un. Transfer Co.	26759	Apr. 19, '88	No ex. filed.	
Pratt *vs.* B. & P. R. R. Co.	27384	Apr. 6, '88	May 12, '88	About 1 month.
Wolf *vs.* Grief	29207	Apr. 23, '88	May 25, '88	About 1 month.
Johnston *vs.* Johnston	26257	Dec. 2, '87	May 4, '88	About 5 months.
83				
Webster *vs.* B. & P. R. R. Co.	24778	Apr. 25, '88	No ex. filed.	
Tilghman *vs.* Linger	28108	Apr. 24, '88	May 10, '88	About 1 month.
Hill *vs.* Evening Critic	26077	Dec. 7, '87	May 1, '88	About 5 mos.
Watson *vs.* Inland & S. C. Co.	25030	Apr. 20, '88	May 12, '88	About 1 month.
Moses *vs.* Whyte	27995	Apr. 20, '88		
Loeber *vs.* Moore	17756	M'ch 8, '79		
Lawler *vs.* Ghiselli	27050	May 3, '88	No ex.	
Schneider *vs.* Keyser	22899	Feb. 8, '88	May 10, '88	About 3 months.
Jones *vs.* B. & O. R. R. Co.	23492	Feb. 16, '88	May 11, '88	About 3 months.
Bigger *vs.* Butterfield	26027	M'ch 15, '88	May 12, '88	About 2 months.
Eberly *vs.* Behrend	28416	May 17, '88	Oct. 9, '88	About 5 months.
84 Anderson *vs.* B. & P. R. R. Co.	27198	June 7, '88	M'ch 26, '89	About 9½ mos.
Caldwell *vs.* B. & P. R. R. Co.	26606	June 5, '88	M'ch 26, '89	About 9½ mos.
Bowie *vs.* Hume	25587	May 25, '88	No ex.	
Butler *vs.* Joyce	27558	May 25, '88	July 13, '88	About 1½ month.
Boteler *vs.* Dexter	27884	June 2, '88	June 14, '88	About 1½ mo.
Peter *vs.* Leonard	26663	Issues from probate.		
Pitt *vs.* Davis	27656	M'ch 22, '88	June 16, '88	About 3 months.
Sheehy *vs.* B. & P. R. R. Co.	27769	May 31, '88	Oct. 10, '88	About 4½ mos.
Patten *vs.* Fleming	28509			
Goldsmith *vs.* Ladson	28181	June 13, '88	July 13, '88	1 month.
Williams *vs.* Ladson	27177	June 26, '88	July 18, '88	About 1 month.
85 Am. Cloak and Suit Co. *vs.* Saks.	28345	July 2, '88	Oct. 12, '88	About 3 mos.
McPherson *vs.* Dist. of Col.	27514	Feb. 6, '88	July 13, '88	About 5 mos.
Chesley *vs.* Riley	28590	July 7, '88		
Lyon & Co. *vs.* Riley	28591	July 7, '88		
Dye *vs.* Va. M. R. R. Co.	27694	June 23, '88	Apr. 28, '89	About 10 mos.
McCarthy *vs.* Nat'l Savings Bank.	27665	May 28, '88		
Reid *vs.* Anderson	27404	June 29, '88	Aug. 6, 88	About 1½ mo.
Johnson *vs.* Dist. of Col.	26208	Jan. 4, '86	M'ch 30, '86	About 1½ mo.
U. S. *ex rel.*, etc., *vs.* Webb *et al.*	28907			
United States *vs.* Wilson	28771			
Nicholson *vs.* Dist. of Col.	27928			

List of Law Causes on Appeal, &c.—Continued.

Title of causes.	No. at law.	Date of judgt.	Date of filing ex.	Remarks.
86				
Crown *vs.* Dist. of Col.	27943			
Koones *vs.* Cook	26193	Nov. 1, '88	No ex.	
Prather *vs.* Lusby	28884	Nov. 17, '88		
Lully *vs.* Morgan	28758	Nov. 26, '88		
Ayer *vs.* Col. R. R. Co.	26570	Nov. 23, '88	Apr. 6, '89	About 4½ mos.
Garner *vs.* Fenwick	28327	July 6, '88		
Gray *vs.* McCully	28955	Jan. 26, '89		
Bunyea *vs.* Met. R. R. Co.	26852	Feb. 15, '89		
Coyle *vs.* Hill	28827	M'ch 20, '89	Apr. 6, '89	About 16 days.
Potts *vs.* W. N. B. B. Club.	28581	M'ch 11, '89	Apr. 15, '89	About 1 month.
Bantam *vs.* B. & O. R. R. Co.	28666	M'ch 15, '89		
87 Nilson *vs.* Hazen	28692	Apr. 3, '89	May 7, '89	About 1 month.
First Nat'l Bank *vs.* Hazen.	28693	Apr. 3, '89		
Sypher *vs.* Wilson	28790	M'ch 26, '89		
White *vs.* Herdic P't'n Co.	26999	M'ch 21, '89	No ex. filed.	
Williams *vs.* Reed	28372	Feb. 13, 89	Apr. 18, 89	About 2 months.

DISTRICT OF COLUMBIA, *ss:*

Arthur W. Ferguson, being first duly sworn, says that he is a member of the bar of the supreme court of the District of Columbia, and that he examined the records of said court and prepared the foregoing statement therefrom, and that he believes that said statement is accurate.

ARTHUR W. FERGUSON.

Subscribed and sworn to before me this 28th day of May, 1888.

R. J. MEIGS, *Clerk,*
By J. R. YOUNG, *Ass't Clerk.*

EXHIBIT D.

In the Supreme Court of the District of Columbia.

Filed June 1, 1889. R. J. Meigs, clerk.

WILLIAM B. BOWIE'S EXECUTRIX *vs.* FRANK HUME. } At Law. 25587.

Affidavit of William Herbert Smith.

88 William Herbert Smith, being first duly sworn, deposes and says—

That he is a member of the bar of the supreme court of the District of Columbia and is the same W. H. Smith referred to in the

affidavit of Sidney T. Thomas filed in the above-entitled cause in opposition to the motion for a new trial; that he assisted as reporter the counsel for the plaintiff in the preparation of the bill of exceptions in the above-entitled cause, and when it was finished he carried the same at the request of the counsel for the plaintiff to the office of Andrew C. Bradley, who was at that time one of the counsel for the defendant in said cause, and delivered the same to him; that he has no independent recollection as to the date of said delivery, but from a memorandum in pencil upon said bill of exceptions he believes it was delivered on or about the 30th of October, 1888; that some time thereafter, and affiant cannot fix the date, he happened to be in the office of Mr. S. T. Thomas, who was also one of the counsel for defendant in the above-entitled cause, on business connected with another case in which he had been engaged, and that said Thomas thereupon informed him that he had examined the bill of exceptions in the above-entitled cause, which had been handed to him by Mr. Bradley, of defendant's counsel; that he did not call at the office of said Thomas for said bill of exceptions at the request of Enoch Totten, Esq., one of the plaintiff's counsel; that on this occasion said Thomas told affiant that Mr. Bradley had made a few suggestions as to alterations in the record, and that he (Thomas) had made some slight suggestions as to slight changes, and that said changes had been noted in lead pencil on the margin of the record, and that he desired affiant to call the attention of Mr. Totten to said alterations to see if he would agree to them; that affiant carried the said bill of exceptions to Mr. Totten and called his attention to said suggestions and changes, to some of which Mr. Totten agreed and as to others he dissented; that when affiant presented said bill of exceptions to Mr. Totten he wrote in lead pencil the word "no"
89 in the presence of the affiant opposite to the only change to which he objected made by the defendant's counsel in the statement of the plaintiff's case, which said alteration consisted in limiting him to a specified reason or ground of objection as to the admissibility of certain evidence; that affiant has no recollection whatever that said Thomas ever told him the bill of exceptions might be presented to Justice Merrick for his signature if counsel for the plaintiff would agree to the proposed changes, and did not so notify plaintiff's counsel; that thereafter and within a short time affiant returned the said bill of exceptions to the said Thomas, and told him that Mr. Totten had agreed to certain changes desired, but would not agree to certain other changes proposed by defendant's counsel; that he has no recollection of having made any statement to defendant's counsel in regard to the testimony of the plaintiff himself or the statement thereof in the bill of exceptions, but, on the contrary, his positive recollection is, and the same has been refreshed by a reference to the record, that there was no change desired in the statement of the testimony of the plaintiff, and that the only question was in regard to the wording of an objection and exception to the said testimony; that said Thomas thereupon stated to affiant that he desired to have Mr. Davidge, one of the counsel for the defendant, examine the said bill of exceptions; that

affiant has no recollection of any request being made to him to notify counsel for the plaintiff that they must appeal to the court to settle the bill of exceptions, because it was plain counsel could not agreed as to what it should contain, and that, as a matter of fact, he never did so notify the plaintiff's counsel; that affiant was not acting for Mr. Totten in the matter except to deliver the said bill of exceptions, as a matter of accom-odation to Mr. Totten, to the said Thomas.

WILLIAM HERBERT SMITH.

Subscribed and sworn to before me this 7th day of June, A. D. 1889.

[SEAL.] HARVEY S. W. DE GAW,
Notary Public.

90 *Bond. Filed June* 9, 1892.

In the Supreme Court of the District of Columbia, the 8th Day of June, 1892.

R. IRVING BOWIE, Administrator *c. t. a. d. b. n.* of Wm. B. Bowie, Deceased,
vs.
FRANK HUME. } No. 25587.

Know all men by these presents that we, Frank Hume and John Fegan, are bound unto the above-named R. Irving Bowie, administrator, etc., in the sum of two hundred and fifty dollars ($250), to be paid to the said R. Irving Bowie, administrator, etc., his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 8th day of June, 1892.

Whereas the above-named Frank Hume has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such that if the above-named Frank Hume shall prosecute his said writ of error to effect and answer all damages and costs if — shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FRANK HUME. [SEAL.]
JOHN FEGAN. [SEAL.]

Sealed and delivered in presence of—
JAMES P. QUINN.

Approved the 9th day of June, 1892.
E. F. BINGHAM,
Chief Justice S. C. D. C.

91 UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Richmond Irving Bowie, administrator *de bonis non cum testamento annexo* of the estate of William B. Bowie, deceased, is plaintiff and Frank Hume defendant as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 28th day of June, A. D. 1892.

J. R. YOUNG, *Clerk.*

92 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you between Richmond Irving Bowie, administrator *de bonis non cum testamento annexo* of the estate of William B. Bowie, deceased, plaintiff, and Frank Hume, defendant, being No. 25587 at law, a manifest error hath happened, to the great damage of the said Frank Hume, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of June, in the year of our Lord 1892, and of the Independence of the United States the one hundred and sixteenth.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*

Service of a copy of the above admitted this 15 day of June, A. D. 1892.

ENOCH TOTTEN,
For Def't in Error.

93 *Citation to the Supreme Court of the United States.*

The United States of America to Richmond Irving Bowie, administrator *d. b. n. c. t. a.* of William B. Bowie, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Frank Hume is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety-two.

June 9th, 1892.

E. F. BINGHAM,
Chief Justice.

On this — day of ——, in the year of our Lord one thousand eight hundred and ——, personally appeared before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the above citation to —— ——.

Service of the foregoing citation is admitted this 18 of June, 1892.

ENOCH TOTTEN,
For Def't in Error.

[Endorsed:] Hume *v.* Bowie.

Endorsed on cover: Case No. 15,077. District of Columbia supreme court. Term No., 1107. Frank Hume, plaintiff in error, *vs.* Richmond Irving Bowie, administrator, &c., of William B. Bowie, deceased. Filed July 7, 1892.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

FRANK HUME, Plaintiff in Error,
vs.
RICHARD IRVING BOWIE, Administrator. } No. 1107.

It is hereby stipulated and agreed that there is an omission in the record in this cause as printed, in respect of rule numbered two of the supreme court of the District of Columbia, and that the following is a true copy of said rule:

"2. The terms of the court shall be as follows:
Of the general term on the—
4th Monday of January.
4th Monday of April.
1st Monday of October.
Of the circuit court on the—
4th Monday of January.
2nd Monday of May, which term shall not continue beyond the 2nd Saturday in July, except to finish a pending trial.
3d Monday of October.
Of the district court on the—
1st Monday of June.
1st Monday of December.
Of the criminal court on the—
1st Monday of March.
3d Monday of June.
1st Monday of December.
Of the special terms on the first Tuesday of every month, except August, in which month there shall be no term of court."

It is further stipulated and agreed that rule numbered sixty-three of the supreme court of the District of Columbia was during the year 1888 and is now as follows:

"63. Every bill of exceptions shall be drawn up by the counsel of the party tendering it and submitted to the counsel on the other side; and where the bill of exceptions is not settled before the jury retires the counsel tendering the bill of exceptions shall give notice in writing to the counsel on the other side of the time at which it is proposed that the bill of exceptions shall be settled, and shall also, at least three days, Sundays exclusive, before the time designated on such notice, submit to the counsel on the other side the bill of exceptions so proposed to be settled; and if they cannot

agree it shall be settled by the justice who presided at the trial, and in that case the justice shall be attended by the counsel on both sides, as he may direct."

It is further agreed that the foregoing rules may be made part of the record of this cause and read at the hearing thereof.

(Signed) ENOCH TOTTEN,
For Defendant in Error.

(Signed) W. D. DAVIDGE,
S. T. THOMAS,
For Pl'ff in Error.

148 U.S. 245

Office Supreme Court U. S.
FILED.
NOV 9 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

FRANK HUME, PLAINTIFF IN ERROR,

v.

RICHMOND IRVING BOWIE, ADMINISTRATOR.

No. 1107.

MOTION TO DISMISS WRIT OF ERROR.

And now comes the said defendant in error and moves the court to dismiss the writ of error in this cause, and for reason says that the judgment of the supreme court of the District of Columbia, to which said writ is directed, is not a final judgment, and that this court is without jurisdiction in the cause.

ENOCH TOTTEN,
For Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR On the Foregoing Motion.

STATEMENT OF THE CASE.

The plaintiff in the court below declared on a promissory note in the words and figures following, to wit:

"WASHINGTON, D. C., *February* 1, 1877.

"Two years after date we promise to pay to the order of A. H. Pickrell and Frank Hume twenty-four thousand seven hundred and fifty $\frac{81}{100}$ dollars, for value received, with interest at eight per cent. per annum, payable semi-annually.

"HALL & HUME.

"With the privilege of paying all or any portion any time before maturity.

"HALL & HUME."

On the back of the note was the following:

"A. H. Pickrell.
"Frank Hume.

"We hold ourselves responsible, jointly and severally, for the within note without demand, notice, or protest.
"February 4, 1879.

"FRANK HUME.
"A. H. PICKRELL."

The defendant below pleaded to the declaration, and issue was joined. On the trial of the cause a verdict was rendered in favor of the defendant on the 25th of May, 1888. (*See Appendix, where will be found, printed, the essential part of the Record.*) During the trial of the cause numerous exceptions were reserved to the rulings and instructions of the court, which were duly noted at the time by the presiding justice upon his minutes. A motion for a new trial, founded on the exceptions for errors of law, &c., was filed in due time, and, having been entertained by the justice, was, June 2, 1888, overruled. From this decision an appeal to the general term was taken, according to the established practice of the court. (Metropolitan

R.R. Co. *v.* Moore, 121 U. S. 562; Rule 54 (2), Appendix.)

The trial court for that term ceased to try causes on the 14th of July, 1888, but the term was kept open, by an order of that date, for the purpose of giving opportunity to prepare and settle bills of exceptions. The order, so far as it relates to this case, is as follows:

"SATURDAY, *July*, 14, 1888.

"Session resumed pursuant to adjournment; present, presiding, Mr. Justice Wm. M. Merrick.

* * * * * *

"By order of the court the May term of the Circuit Court, division No. 2 is hereby entered as extended that the bills of exceptions not yet filed may be settled, to wit:

* * * * * *

"BOWIE *v.* HUME. } 25,587. At Law."

* * * * * *

The rule of the court (Rule 62) on this subject is as follows: "The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment, in order to prepare it." (See Appendix.)

The term of the court at which the trial was had was not adjourned *sine die*.

The bill of exceptions was prepared by counsel for the plaintiff and submitted to the counsel for the defendant, but they could not settle it by agreement. Pending the consideration of the bill of exceptions, the justice who presided at the trial became ill, and afterwards and on the — day of February, 1889, he died, the bill of exceptions remaining unsettled.

Rule 64 of the supreme court of the District of Columbia

provides that "In case the judge is unable to settle the bill of exceptions, and counsel cannot settle it by agreement, a new trial shall be granted." (See Appendix.)

Soon after the death of Mr. Justic Merrick, the counsel for plaintiff below filed a motion to set aside the verdict and judgment and for a new trial on the ground that the trial justice had died "without having settled or signed and sealed" the bill of exceptions. This motion was supported by affidavits and certificates of the clerk of the court showing various entries on the records, of which sufficient have been printed for the purposes of this motion.

This motion was ordered by the justice holding the special term to be heard in the first instance in the general term. Upon argument in the general term the motion was allowed and the judgment and verdict were set aside and a new trial was granted. The body of the judgment entered by the general term is in the words and figures following, to wit:

"The motion of the plaintiff to set aside the verdict and judgment and to grant a new trial in this cause because the bills of exceptions containing the exceptions reserved on the trial could not be settled, signed, and sealed as required by law, the justice of the court who presided at the trial (in division No. 2, May term, 1888, of this court) having departed this life without having settled or sealed or signed the same, came on to be heard, and, the plaintiff being deceased, was argued in behalf of R. Irving Bowie, administrator *de bonis non C. T. A.* of William B. Bowie, deceased, and submitted. It is this 26th day of April, 1892, considered, adjudged, and ordered that the said motion be granted, and the judgment and verdict are set aside accordingly, and a new trial granted the plaintiff."

Thereupon the plaintiff in error sued out this writ and

brought up the record to this Court, and now the defendant in error moves to dismiss the writ because the judgment of the court below is not a final judgment.

POINTS AND AUTHORITIES.

In the supreme court of the District of Columbia, in general term, it is not the practice, in setting aside a verdict and judgment at law, to remand the cause to the special term with directions; this is not necessary, because the "supreme court sitting at special term and the supreme court sitting in the general term * * * is the same tribunal."

Met. R.R. Co. *v.* Moore, 121 U. S. 579.

But a judgment setting aside a verdict and judgment at law and ordering a new trial in a cause by the general term is equivalent to remanding the cause to the special term for a new trial. It is well settled by this Court that such a judgment is not "final," and that it is not reviewable in this Court. In a recent case this Court, speaking by Mr. Justice Field, said:

"A judgment of a lower appellate court which reverses the judgment of the court of original jurisdiction, and remands the case to it for further proceedings, is not a final judgment. A judgment of reversal is only final when it also enters or directs the entry of a judgment, which disposes of the case."

Smith *v.* Adams, 130 U. S. 177.

See, also:

District of Columbia *v.* McBlair, 124 U. S. 320.
Baker *v.* White, 92 U. S. 176.
Johnson *v.* Keith, 117 U. S. 199.
Davis *v.* Cranch, 94 U. S. 514.
Bostwick *v.* Brinkerhof, 106 U. S. 3.

Even if the order setting aside the verdict and judgment in this case was erroneous, as will probably be contended, this Court can have no jurisdiction until after final proceedings have been had, as directed by the order granting a new trial.

Coughlin *v.* D. C., 106 U. S. 11.

The writ of error should be dismissed.

ENOCH TOTTEN,
For Defendant in Error.

APPENDIX.

Part of Transcript of Record.

BILL OF EXCEPTIONS.

[Filed June 7, 1892.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,
In General Term, April, 1892.

WILLIAM B. BOWIE'S EXECUTRIX, Plaintiff, } At Law.
v. } No. 25,587.
FRANK HUME, Defendant.

Bill of Exceptions.

On the 26th day of April, 1892, at the hearing of the motion filed in this cause by Anna H. Bowie, executrix of William B. Bowie, deceased, on the 23d day of April, 1889, to vacate the judgment and verdict therein, on the 25th day of May, 1888, rendered and recovered against William B. Bowie, her testator, in favor of the defendant, which motion, on the 8th day of June, 1889, was ordered to be heard in the general term in the first instance, there was read to the court in support of said motion two certificates of R. J. Meigs and three affidavits hereto annexed, marked A, B, C, D, hereby made part of this bill of exceptions, and the defendant, in resistance and against the allowance of the said motion, thereupon read to the court the certificate of R. J. Meigs, clerk, and of Dorsey Clagget, register of wills, and the three certain affidavits hereto annexed, marked F, G, H, I, and J, and hereby made part of this bill of exceptions.

And the only evidence offered by the plaintiff or by the defendant or heard or considered by the court upon the hearing of the said motion or in connection therewith were the said certificates and affidavits so marked as aforesaid.

And upon the said motion and upon the certificates and affidavits, and upon them alone, the court, on the 26th day of April, 1892, after argument, as well on behalf of R. Irving Bowie, administator *de bonis non C. T. A.* of Wil-

liam B. Bowie, deceased, in support of the said motion, as on behalf of the defendant in resistance thereof, granted the said motion, and ordered and directed that the said judgment so by the defendant recovered against Wm. B. Bowie on the 25th day of May, 1888, be vacated and set aside and a new trial granted, in the words and figures following, to wit:

"IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

"WILLIAM B. BOWIE'S EXECUTRIX, Plaintiff, } At Law.
"*v.*
"FRANK HUME, Defendant. } No. 25,587.

"The motion of the plaintiff to set aside the verdict and judgment and to grant a new trial in this cause because the bills of exception containing the exceptions reserved on the trial could not be settled, signed, and sealed as required by law, the justice of the court who presided at the trial (in division No. 2, May term, 1888, of this court) having departed this life without having settled or sealed or signed the same, came on to be heard, and, the plaintiff being deceased, was argued in behalf of R. Irving Bowie, administrator *de bonis non, C. T. A.*, of William B. Bowie, deceased, and submitted. It is, this 26th day of April, 1892, considered, adjudged, and ordered that the said motion be granted, and the judgment and verdict are set aside accordingly, and a new trial granted the plaintiff."

And, at the time the court granted the said motion and ordered and directed the said verdict and judgment to be vacated and set aside and a new trial to be granted to the plaintiff, the defendant duly excepted to the said motion and to such order and judgment of the court, and prayed the court to seal and sign this his bill of exceptions, which is now done, during the term whereat the said motion was granted, and the said order and judgment were given, accordingly, on this 7th day of ———, 1892.

E. F. BINGHAM, *C. J.* [SEAL.]

A.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Filed April 23, 1889.—R. J. Meigs, Clerk.]

WILLIAM B. BOWIE'S EXECUTRIX
v.
FRANK HUME. } At Law. No. 25,587.

Affidavit in support of the motion for a new trial in the above-entitled cause.

DISTRICT OF COLUMBIA, *ss:*

I, Benjamin G. Lovejoy, being first duly sworn, do depose and say that I am one of the counsel of record for the plaintiff in the above-entitled cause, and that said cause came on for trial on the — day of May, 1888, in the division No. 2 of the circuit court, held by Mr. Justice Merrick, in pursuance of the orders of the general term of this court passed on the 3d day of January, 1888, and the 27th day of April, 1888, and that said trial resulted in a verdict and judgment on the 25th day of May, 1888, in favor of the defendant, and that the said court, (division No. 2) ceased to try causes on the 14th day of July, 1888.

On the 28th day of May, 1888, a motion for a new trial, founded on the exceptions reserved during the said trial, was filed, which was entertained by the said justice holding said court, and was by him afterwards and on the 2d day of June, 1888, by said court overruled, and from this decision an appeal to the general term was taken.

The said term of the said circuit court (division No. 2) was not then and never to this day has been finally or formally adjourned without day, and the records, entries, and minutes do no not show that any such adjournment *sine die* has been made of the said term.

Division No. 1 of said circuit court was adjourned *sine die* on the 14th day of July, 1888, save and except as to those cases therein wherein bills of exception were to be prepared, and as to those cases the court was prolonged for that purpose.

During the trial of the said cause as aforesaid, numerous exceptions were taken to the rulings and instructions of the said court, which were, before verdict, entered upon the minutes of the said justice presiding at said trial; but the same were not reduced to writing at the time, and the trial was proceeded with upon the noting as aforesaid of the exception. On the 14th day of July, 1888, on which day the said division No. 2 of said circuit court ceased to try causes, an order was made by said court (division No. 2) and entered of record prolonging the said term of said court in order to give opportunity to prepare and settle a bill of exceptions in the said cause, as well as in other causes tried in the said division of said court at said term.

It is, and has for many years been, the custom in this court to hold no trials of civil causes at law between about the middle of July and the month of October in each year, and the period including the latter part of the month of July, the whole of the month of August, and a part of the month of September of each year has usually been almost universally devoted to rest from professional labors or to a summer vacation by the bar and bench of the said supreme court of the District of Columbia.

Immediately after said "summer vacation" of 1888, counsel for the plaintiff in the above cause began the preparation of the formal bill of exceptions for the purpose of embodying the exceptions as aforesaid to the said rulings and instructions of the court during said trial, and on or about the 4th day of October, 1888, completed the same, and on that day tendered them to counsel of record for the defendant, for the purpose of settling them by agreement of counsel. Two of said counsel promptly examined the said bill of exceptions, but retained the said bill of exceptions so tendered in order to give opportunity to the third counsel for defendant to examine them, until the 23d day of March, 1889, when the same were returned to counsel for the plaintiff.

About the 11th or 12th day of December, 1888, said presiding justice, the Hon. William M. Merrick, while sitting in general term of this court, being ill, left the court

and never returned to it and never afterwards attended to any further official business; and on the 9th day of February, 1889, died, the said bill of exceptions never having been settled, signed, or made of record.

All the proceedings on the said trial were fully and carefully reported by an experienced and skilful stenographic reporter, jointly employed by the parties to the cause, and his report thereof was, soon after the trial, written out and copied by means of a type-writer, and copies thereof were delivered to the parties, and the same are now easily accessible.

The plaintiff in the said cause, William B. Bowie, also departed this life on the — day of December, 1888, and Annie H. Bowie, his widow, has been duly appointed and has qualified as the executrix of his last will and testament.

True copies of the following specified rules of the supreme court of the District of Columbia in force at the time of said trial and now in force, and the following orders and entries forming parts of the judicial records of this court, duly certified by the clerk thereof, attested by the seal of this court, are hereto attached, and reference is hereby made to the same as a part of this affidavit, to wit:

1. Rule No. 1, fixing the terms of this court.
2. Rule No. 61, }
3. " 62, } relating to bills of exceptions.
4. " 64, }

5. Copies of the two orders of the general term of this court providing for two terms of the circuit court, to be called division No. 1 and division No. 2, dated January 3d, 1888, and April 27th, 1888.

6. Copy of the entry of verdict and judgment in this cause.

7. Copy of entry of order of July 14, 1888, extending the said term (division No. 2) for the purpose of giving opportunity to prepare and settle bills of exceptions.

8. Copy of order prolonging circuit court No. 1 for the purpose of preparing and settling bills of exceptions.

9. Order of general term, dated January 24, 1889, as-

signing justices to the different branches of the court for 1889.

BENJAMIN G. LOVEJOY.

DISTRICT OF COLUMBIA, *ss:*

Benjamin G. Lovejoy personally appeared before me in my office on the 22d day of April, 1889, and made oath that he had read the foregoing affidavit by him subscribed, and that he knows the contents thereof, and that the same is true according to his best knowledge, information, and belief.

[SEAL.]

R. J. MEIGS,
Clerk,
By R. J. MEIGS, JR.,
Ass't Clerk.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

WILLIAM B. BOWIE'S EXECUTRIX
vs.
FRANK HUME.
} At Law. No. 25,587.

Certificate of Clerk.

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the following rules of the court, to wit, Rules No. 2, No. 54, No. 61, No. 62, and No. 64, were in force in this court on the 1st day of May, 1888, and that they have ever since been and now are of force in said court.

RULE NO. 2.

Terms of Court.

The terms of the court shall be held as follows:

OF THE GENERAL TERM, ON THE

4th Monday of January;
4th Monday of April;
1st Monday of October.

OF THE CIRCUIT COURT, ON THE

4th Monday of January;
2d Monday of May, which term shall not continue beyond the 2d Saturday in July, except to finish a pending trial.

OF THE DISTRICT COURT, ON THE

1st Monday of June;
1st Monday of December.

OF THE CRIMINAL COURT, ON THE

1st Monday of March;
2d Monday of June;
1st Monday of December.

OF THE SPECIAL TERMS, ON THE

1st Tuesday of every month except August, in which month there shall be no term of court.

RULE 54.

Motions for new trial may be grounded on errors of law in the rulings of the justice presiding at the trial.

1. The motion may be made upon the bills of exceptions, in which case it must be filed in the circuit court, but shall be heard in the general term in the first instance.

2. The justice who tried the cause may, in his discretion, before any bills of exceptions are prepared, entertain a motion to set aside the verdict for errors of law founded on the exceptions reserved during the trial and noted on his minutes. An appeal may be taken from the decision of the justice on such motion, in which case a bill of exceptions must be settled in the usual manner.

RULE 61.

If a party desires to present for review in the general term the rulings or instructions of the presiding justice

for alleged errors of law, he must at the trial and before verdict except to such rulings or instructions; and he may, at the time of taking exception, reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes and proceed with the trial, and afterwards settle the bill of exceptions. (Rules S. C. D. C., p. 26.)

RULE 62.

The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment, in order to prepare it. (Rules S. C. D. C., p. 26.)

RULE 64.

In case the judge is unable to settle the bill of exceptions, and counsel cannot settle it by agreement, a new trial shall be granted. (Rules S. C. D. C. p. 27.)

And I further certify that the following orders and entries appear of record in this court, to wit:

Copy of Order of General Term directing the terms of the Circuit Court, dated January 3d, 1888.

TUESDAY, *January 3d*, 1888.

Ordered, further, that in addition to the circuit court to be held by Justice Hagner on the fourth Monday of January, 1888, a second circuit court shall be held, at the same time, by Justice Merrick in the western audience room of the south front of the court-house, the court to be held by Justice Hagner to be known as division No. 1, and the court to be held by Justice Merrick to be known as division No. 2.

The cases on the first half of the calendar shall be tried in division No. 2, and the cases on the last half of the calendar shall be tried in division No. 1.

The first twenty-six jurors drawn for service in said courts shall serve in division No. 1, and the 26 persons next drawn shall serve in division No. 2.

Copy of Order of General Term continuing said two terms, dated April 27, 1888.

Ordered that the circuit courts now being held in divisions No. 1 and 2 be continued further in same order by same justices through May term thereof.

Copy of Entry of Verdict and Judgment in this Court.

FRIDAY, *May* 25*th*, 1888.

Session resumed pursuant to adjournment; present, presiding, Mr. Justice W. M. Merrick.

WM. B. BOWIE
v.
FRANK HUME. } 25,587. Law Cal. 19.

Now come again the parties aforesaid, in manner and form aforesaid, and the same jury respited yesterday, who on their oath say they find for the defendant. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff $ for his costs of suit and have his execution thereof.

Copy of Order prolonging Term of Division No. 2, *of order July* 14*th*, 1888.

SATURDAY, *July* 14, 1888.

Session resumed pursuant to adjournment; present, presiding, Mr. Justice Wm. M. Merrick.

* * * * * *

By order of the court the May term of the Circuit Court, division No. 2 is hereby entered as extended that the bills of exception not yet filed may be settled, to wit:

* * * * * *

BOWIE vs. HUME. } 25,587. At Law.

* * * * * *

Copy of Order of General Term of Division No. 1 of date July 14, 1888.

DIVISION NO. 1, *July* 14, 1888.

The court orders the term of this court extended for the purpose of settling bills of exceptions and case in the following cases: * * * (cases named). And thereupon the May term adjourned without day except as above stated.

Copy of Order of General Term January 24, 1889, Assigning Justices.

THURSDAY, *January 24th*, 1889.

Session resumed pursuant to adjournment; present, presiding, Mr. Chief-Justice Bingham, Hagner and James.

Assignment of justices for 1889: Ordered that the assignment of justices to serve in the supreme court of the District of Columbia for the year 1889 be as follows:

First. For the general term, Justices Hagner, James, and Merrick.

Second. For the circuit court, Chief-Justice Bingham.

Third. For the equity and orphans' court, Justice Cox.

Fourth. For the district court, Justice James.

Fifth. For the criminal court, Justice Montgomery.

Witness my hand and the seal of said court this 5th day of April, 1889.

[SEAL.]

R. J. MEIGS,
Clerk,
By J. R. YOUNG,
Asst. Clerk.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

May Term, Circuit Court, Division No. 2.—Prolonged.

[Filed April 23, 1889.—R. J. Meigs, Clerk.]

WILLIAM B. BOWIE'S EXECUTRIX
v.
FRANK HUME. } Law. No. 25,587.

Notice of Motion to Set Aside Verdict.

Please take notice that on Saturday, the 27th day of April, 1889, at the opening of the court on that day, or as soon thereafter as counsel can be heard, we shall move the court to set aside the verdict and grant a new trial in this cause for the reasons stated in the motion on file. The motion will be based upon the files and records of this court and the affidavit now on file herein with the said motion.

ENOCH TOTTEN,
BENJ. G. LOVEJOY,
For Plaintiffs.

To—

W. D. DAVIDGE,
S. T. THOMAS,
For Defendant.

Service of copy ack. Ap. 23, 1889.

S. T. THOMAS.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[Filed May 10, 1889.—R. J. Meigs, Clerk.]

BOWIE'S EX'R
vs. } At Law. No. 25,587.
FRANK HUME.

Notice that Motion will be called up to set aside Verdict and Judgment and to get a New Trial.

Please take notice that on Tuesday next, the 14th day of May, 1889, at the opening of court (Chief-Justice Bingham) on that day or as soon thereafter as counsel

can be heard, I shall call up the motion in the above cause, now on file, to set aside the verdict and judgment and to get a new trial.

This motion will be called up before Bingham, C. J., holding the circuit court.

ENOCH TOTTEN AND
B. G. LOVEJOY,
Att'ys for Pl'tf.

To—

W. D. DAVIDGE and
S. T. THOMAS.

Copy rec'd May 10, 1889.

S. T. THOMAS.

Mem.—The foregoing part of the record is deemed sufficient for the purposes of this motion.

E. T.

148 U.S. 245

Office Supreme Court U. S.
FILED.
DEC 17 1892
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1892.

No. 1107.

FRANK HUME, PLAINTIFF IN ERROR,

v.

RICHMOND IRVING BOWIE,
ADMINISTRATOR, ETC.

Brief for Plaintiff in Error on Motion to Dismiss for Want of Jurisdiction.

W. D. DAVIDGE,
S. T. THOMAS,
Attorneys for Plaintiff in Error

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

FRANK HUME, PLAINTIFF IN ERROR, *v.* RICHMOND IRVING BOWIE, ADMINISTRATOR, &C.	*No.* 1107.

Motion to Dismiss Writ of Error for Want of Jurisdiction.

The ground of the motion is that the judgment brought here by the writ is not a final judgment.

THE CASE.

The plaintiff in error was sued as indorser of a promissory note for $24,750.81 by the testator of the defendant in error (R. 1). The cause was tried at a circuit court, and the jury found for the defendant, the plaintiff in error, and on the 25th of May, 1888, judgment was rendered upon the verdict (R. 14). A motion was duly made for a new trial, and on the 2d of June, 1888, the motion was overruled and an appeal taken to the general term as well from

the judgment as the order overruling the motion for a new trial, which appeal was duly perfected (R. 14, 15, 16, 17).

The judgment was rendered at the May term of the court. The next term began on the 3d Monday of October, 1888, and the next after on the 4th Monday of January, 1889. (See Rule 2, R. 40, as corrected by stipulation at end of Record, p. 59; also R. S. D. C., Sec. 755.)

At the trial numerous exceptions were taken by the plaintiff below. By reference to Rule 2 it will be seen that the May term "shall not continue beyond the second Saturday in July, except to finish a pending trial" (R. 40).

By Rule 62 (R. 41) it is provided that "the bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it."

In pursuance of these rules, Mr. Justice Merrick, who held the May term, on the 14th of July, 1888 (the second Saturday of July), made an order that the term should be extended, that the bills of exceptions in this and other causes not then filed might be settled (R. 42, 43).

Mr. Justice Merrick held the second division of the circuit, the first being held by Mr. Justice Hagner, and the latter, on the same day, the 14th of July, 1888, passed a similar order, the only difference being that instead of extending the May term generally, he adjourned it, except for the special purpose of settling bills of exceptions and cases (R. 43).

After the above order of Mr. Justice Merrick there was no further order made at any time in reference to the settlement of the bills of exceptions; neither was there at any time any motion or other proceeding touching that subject.

No bills of exceptions were delivered or tendered to the judge either during the May term or at any subsequent time.

The bills were not prepared until "on or about the 4th day of October, 1888" (Rec. 39), and late in the same month the draft was delivered to the attorney of the plaintiff in error (Rec. 47). On the 6th of February, 1889, Mr. Justice Merrick died (Rec. 46).

On the 23d of April, 1889—that is, after the May term and the October term and well-nigh the close of the January term—a motion was made by the executrix of the plaintiff below, who had been substituted as plaintiff (R. 16, 17), to set aside the verdict and judgment, and grant a new trial, "because the bill of exceptions cannot be settled, signed, and sealed as required by law, the justice of this court who presided at trial of this cause (in division No. 2, May term, 1888, of this court) having departed this life without having settled or signed and sealed the same" (R. 17).

This motion was supported by an affidavit of counsel in excuse of laches, and certificates of the clerk as to rules and orders of court (R. 17, 23). Counter affidavits and certificates of the clerk and register of wills were filed (R. 23, 30).

Afterwards two other affidavits were filed in support of the motion (R. 30–34). On the 8th of June, 1889, the court ordered the motion to be heard in the general term in the first instance (R. 34). The motion was accordingly heard in general term, and that court granted the motion and rendered judgment, setting aside the former judgment and granting a new trial (R. 36).

To this ruling the plaintiff in error excepted, and a bill of exceptions, as well to the motion as to the judgment, was, during the term, duly signed and sealed (R. 36–56). This writ of error was then sued out (R. 56, 57). The motion to dismiss raises two questions: First, whether the court had jurisdiction, on motion after the term, to vacate the

judgment; and if it had not—second, whether the judgment vacating the former judgment is a final judgment?

ARGUMENT.

The case of Phillips *v.* Negley, 117 U. S. 665, decided in 1885, is absolutely decisive as to both these questions. There a judgment recovered in the court below was, after the term, vacated and a new trial granted at special term, on motion alleging fraud, deceit, surprise and irregularity.

The court in general term having ruled that the court in special term had jurisdiction to grant the motion in its discretion, the judgment of the court in general term was brought here by writ of error.

It was insisted in argument here that the court below had jurisdiction to vacate the judgment, and also that its judgment, as it vacated the former judgment for the purpose of a new trial, was not a final judgment. Thus both the questions involved in this case were directly presented and necessarily passed upon in Phillips *v.* Negley.

Mr. Justice Matthews, delivering the opinion of this court, says (p. 671–2):

"The same consideration is urged upon us as a ground for dismissing the present writ of error for want of jurisdiction in this court, it being alleged that the order of the Supreme Court of the District at special term is one not only within the discretion of that court, but that, as it merely vacates a judgment for the purpose of a new trial upon the merits of the original action, it is not a final judgment, and, therefore, not reviewable on writ of error. If, properly considered, the order in question was an order in the cause, which the court had power to make at the term when it was made, the consequence may be admitted, that no appellate tribunal has jurisdiction to question its pro-

priety; for, if it had power to make it, and it was a power limited only by the discretion of the court making it, as in other cases of orders setting aside judgments at the same term at which they were rendered and granting new trials, there would be nothing left for the jurisdiction of an appellate court to act upon. The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order made was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of this Court to entertain in the present writ of error, therefore, necessarily involves the jurisdiction of the supreme court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself.

"The legal proposition involved in the judgment complained of, and necessary to maintain it, is, that the Supreme Court of this District at special term has the same discretionary power over its judgments, rendered at a previous term of court, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials of the actions in which they were rendered, which it has over judgments, when such proceedings are taken during the term at which they were rendered; and that this being true, the proceeding and order of the court, in the exercise of this jurisdiction and discretion, cannot be reviewed on appeal or writ of error.

"This proposition, it is argued, may be deduced from the inherent and implied powers of all courts of record, according to the course of the common law; and, if that fails, is supplied by the law of Maryland, as to the Supreme Court in the District of Columbia, adopted by the act of Congress of 27th February, 1801. 2 Stat. 103."

The learned justice then proceeds to examine both

branches of the above proposition, and concludes that by the course of the common law and according to the uniform doctrine of this court no court has jurisdiction, upon motion after the term, to vacate or annul its judgments or substantially vary them in any material thing, except that clerical mistakes and such mistakes of fact as could be corrected by writ of error *coram vobis* (or, on motion, in place of that writ where such practice prevails) and a mistake in the dismissal of a cause may be corrected after that time, and that the remedy, subject only to the above exception, was by bill in equity, and further that the statute of Maryland relied on as giving the jurisdiction had no such effect, notwithstanding the decisions of the court of appeals of Maryland to the contrary (pp. 672–677).

And this court is equally explicit on the subject of the finality of the judgment rendered without jurisdiction and vacating a former judgment.

At p. 676 the learned justice says :

"The remedy by writ of error *coram nobis* continued in force and in use in Maryland. *Hawkins* v. *Bowie*, 9 G. and J., 428, 437 ; *Bridendolph* v. *Zeller's Executors*, 3 Maryland, 325. And in the first of these cases it was held that a reversal of a judgment upon such a writ was a final judgment from which an appeal would lie. The court said : 'Now, if reversing the original judgment and awarding costs to the plaintiff in error in this proceeding in error *coram nobis*, was not so far final as to fall within that class of judicial acts from which an appeal will lie to this court, we cannot see the reason, nor can we conceive of any remedy the parties would have if the county courts were to undertake to vacate and annul all the judgments in their records.' *This remark equally applies whether the result is reached by this writ or by the more summary mode of a motion. It was so decided in Graff* v. *Merchants' & Miners' Transportation Co.*, 18 Maryland, 364, and *Craig* v. *Wroth*, 47 Maryland, 281."

The judgment of this court reversed the judgment below and remanded the cause with directions to *dismiss the motion without prejudice to the right to file a bill in equity* (p. 679).

It is argued in the brief in behalf of the defendant in error that the judgment or order vacating the former judgment is not final, because it does not dispose of the cause but directs a new trial, and many decisions of this Court are cited. The form of the judgment is precisely the same as in Phillips *v.* Negley (p. 668). The decisions referred to—and many others could be cited—relate to new trials or other further proceedings here in the progress of a cause, and, as said by Mr. Justice Matthews, "in the exercise of acknowledged jurisdiction," *sup.*

The present case belongs to an entirely different class, where the judgment brought here for review is without jurisdiction.

The error of the brief consists in confounding two distinct and independent things—the proceeding in which the original judgment was rendered, and a new proceeding to vacate that judgment, instituted not by motion during the term, but after the term and when all jurisdiction over the judgment had ceased.

In such new proceeding without jurisdiction, whatever its form, the judgment is necessarily final.

As said by Mr. Justice Miller in Bronson *v.* Shulton, 104 U. S. 410, 417: "The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered."

The new proceeding, whatever the mode of procedure, whether by motion after the term when that is allowed by statute, or by bill in equity, is for an essentially different pur-

pose from the proceeding in which the original judgment was rendered. It is, indeed, a new cause and the judgment or decree is an end of that cause.

Freeman on Judgments, s. 18, and cases.
Marine Ins. Co. *v.* Hodgson, 7 Cranch, 332.
Crim *v.* Handley, 94 U. S. 652.
Kibbe *v.* Benson, 17 Wall. 624.
Embry *v.* Palmer, 107 U. S. 3.
Cragin *v.* Lovell, 109 U. S. 194.
Phillips *v.* Negley, 117 U. S. 665.

It is apparent that the present case is not within any of the exceptions. The judgment brought here was not rendered to correct clerical misprision nor to reinstate the cause improperly dismissed. Neither was it rendered to correct any mistake of fact properly the subject of a writ of error *coram nobis* or *nobis*. The limited province of such a writ, or the motion taking its place, is pointed out by Mr. Justice Miller in Bronson *v.* Shulten, 104 U. S. 410, 416. The facts to be corrected are facts not in issue or passed upon by the court, but which are material to the proceeding in which the judgment was rendered, such as error in the proofs through default of the clerk, that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared, or a *feme covert* and the like. The mistake of fact which could be corrected by the writ was always as to some fact not litigated but existing at the time of the rendition of the judgment, and which if known to the court would have prevented the judgment. Freeman on Judgments, s. 94. Thus the mistake always entered into the judgment and affected its integrity.

What, in the present case, was the motion upon which judgment was entered? It was a motion made eleven

months after the rendition of the judgment to set it aside, because, nearly nine months after its rendition, the judge died without settling or signing and sealing the bill of exceptions.

Thus the judgment is not in any manner impeached. There is no pretence of the existence of any fact at the time of its rendition which would have prevented such rendition. On the contrary, it is practically conceded that the judgment is perfect and absolute until reversed in due course of appellate proceedings, and the relief sought by the motion is by reason of a fact, the death of the judge, which transpired long posterior to its rendition. It seems absurd to contend that such a motion is within the principle of writs of error *coram vobis* or *nobis*.

It is to be observed that in the present case the judgment of the court below is far less defensible than was the judgment in Phillips *v.* Negley. In that case the motion was based upon alleged vices inherent in the judgment itself, fraud, &c., and the Maryland statute certainly afforded some color for seeking relief by motion after the term. In the present case the judgment is not assailed, and it must be conceded that the statute could not possibly apply. There is no pretence of "any fraud, deceit, surprise, or irregularity *in obtaining*" the judgment. Kilty's Laws, Nov., 1787, ch. IX, s. VI.

Even in Maryland, where it is held, in the decisions referred to in Phillips *v.* Negley and which this Court declined to follow, that an equitable jurisdiction of courts of law over judgments, by motion after the term, was recognized by the above statute, such jurisdiction is confined strictly to the cases enumerated in the statute; that is, to cases where *judgments* are alleged to have been *obtained* by fraud, deceit, surprise, or irregularity. All other grounds of relief against judgments are, after the term, remediable by bill in equity only.

Thus a court of law of that State would have no jurisdiction to render the present judgment.

In Ruppertsberger *v.* Clark, 53 Md. 402, where it was alleged that the time for signing a bill of exceptions had been extended beyond the term by the agreement of the attorneys, relief was sought by bill in equity.

What has been said seems to dispose of the present motion.

As, however, in the argument below it was insisted that the May term, 1888, was still subsisting when, on the 23d of April, 1889, the motion was made, it is proper briefly to notice this point. Rule 2 fixing the terms of the circuit provides that the May term shall not continue beyond the second Saturday in July, except to finish a pending trial (R. 40).

Rule 62 declares that the bill of exceptions must be settled during the term, which may be *prolonged* in order to prepare it (R. 41).

Taking the two rules together it must be evident that, the former having fixed a limit, beyond which the May term should not continue, the latter created an exception for the purpose of settling bills of exception. Hence, when the second Saturday in July arrived, there being bills of exceptions in a number of causes unsettled, Mr. Justice Merrick passed an order extending the term beyond the limit fixed by Rule 2 for the special purpose of settling them (R. 42). This same thing was done by Mr. Justice Hagner, who held division No. 1 of the circuit court as Mr. Justice Merrick held division No. 2 (R. 22, 42, 43).

The only difference between the two orders is that the latter, that of Mr. Justice Hagner, adjourned the term save for the special purpose, whilst that of Mr. Justice Merrick extended the term for the special purpose, without adjourning it for other purposes. In respect of the settle-

ment of bills of exception the orders are identical, and both *extended the term* for that purpose. The orders thereby allotted, if necessary, to the special purpose in view, a period of a little over *three months;* that is, the period intervening between the date of the orders (July 14, 1888) and the ensuing term, the third Monday of October, 1888 (October 15, 1888), certainly a very reasonable time. After the May term had ended by operation of law, and after the ensuing October term had intervened, and after the January term, 1889, had progressed to well-nigh its close, the motion to vacate was filed.

Neither during the May term after the above order, nor the October term, nor the January term until the motion was filed, was there any order of the court or motion or other act whatsoever in relation to the exceptions in this case. This is shown by the record.

When the October term, 1888, was adjourned, on the 26th of January, 1889, it was adjourned without day, except that it was "extended to settle bills of exceptions or case *in cases tried at this term of the court*" (R. 51).

The position of the learned counsel in support of the motion to dismiss is that because the May term was not adjourned *sine die* it was indefinitely kept open. There are several answers to this.

1. The order of Mr. Justice Merrick shows on its face what was intended; that is, that the term was to be "extended"; or, in the words of Rule 62, "prolonged" for the special purpose instead of ending as provided by Rule 2.

Such an order merely "extended" or "prolonged" the current term until it should be adjourned by judicial act or expire by efflux of time. It did not invest the term with the quality of immortality and enable it to "run on forever."

The opposite brief says (p. 3) that the May term was "kept open" and that "it was not adjourned *sine die*." This is true in the sense that the term was "kept open" instead of being adjourned *sine die*, but it is not true that because the term was not adjourned it was indefinitely extended or prolonged. Terms of court end in two ways—either by the act of the judge or by efflux of time and the commencement of the succeeding term; or, in other words, by operation of law. It is denied that any judge would have the power to extend a term generally and indefinitely beyond succeeding terms for the purpose of settling exceptions or any other purpose.

It is true exceptions may be settled after the term, but that can only be done by virtue of an *express order* made during the term or by consent of parties.

Ex parte Bradstreet, 4 Pet. 102, 107.
Hunnicutt *v.* Peyton, 102 U. S. 333, 358.

But such an order is entirely different from the general and indefinite extension of the term in violation of the command of the law requiring new and successive terms.

In Arkansas, where there is a statute authorizing the extension of the term for settling bills of exceptions, it was held that, when the term was extended generally, such extension terminated with the beginning of the next term, and a bill of exceptions signed after that time was treated as a nullity.

Garibaldi *v.* Carroll, 33 Ark. 568, 570.

Indeed, the word "extended" is relative in its application and refers to something already existing and implies a continuation of the same thing.

Thus, looking at the words of the order and its evident purpose to afford three months for the settlement of bills

of exception, and the want of power of the justice to keep alive a term of the court indefinitely and after a succeeding term had come and gone, the conclusion appears to be inevitable that the May term necessarily ended when the October term began.

And even if the order could be regarded as an order for the settlement of exceptions after the term, that would not continue jurisdiction over the judgment, for, in the case supposed, the motion to set aside the judgment would be made after the term at which the judgment was rendered.

Such an order could not operate to extend the term.

Whilst under it the exceptions might be settled after the term, yet such settlement would be simply an act done after the term in execution of an order made during the term.

U. S. *v.* Breitling, 20 How. 252.
Mueller *v.* Ehlers, 91 U. S. 249.

It by no means follows, however, that because an order, made during the term, may, after the term, be carried into execution, a new proceeding confessedly not in pursuance of any order made during the term may be instituted after the term to set aside a judgment rendered at a previous term.

Even assuming that an order to settle exceptions after the term could run indefinitely and through succeeding terms, it would only enable exceptions to be settled, and could have no sort of effect in continuing the term beyond the time limited by law.

And, more than this, if the order should undertake to extend the term beyond its legal duration and through succeeding terms for the specific purpose of settling exceptions, the term would for all other purposes come to an end at the time limited by law, if, indeed, it would not

so end even in respect of exceptions, thus making their settlement simply an execution of an order made during the term, according to the general practice.

It thus appears that in no possible view of the case can it be said that the May term continued until the motion to vacate was made. The question here is not as to the validity of the bill of exceptions, for it is conceded it never was acted on.

The question is whether the court had power by the judgment brought here to vacate a judgment rendered at a previous term. That judgment on its face was absolute and in no respect dependent upon what might or might not be done as to the exceptions.

2. The record shows on its face that the motion to vacate was made at the January term, 1889, held by Mr. Chief-Justice Bingham, and was by him certified to the general term for hearing in the first instance (R. 16, 34).

If the May term still had existence nobody held it or professed to hold it, and certainly the motion was made in fact at a subsequent term and to a judge whose authority was confined exclusively to such subsequent term and who assumed jurisdiction as holding such term.

Even then if the fanciful notion of the co-existence of the May term with the succeeding October and January terms has any place in the law of this District it is plain that the judgment brought was a judicial act performed by the court below, the general term, in pursuance of jurisdiction assumed, not by a judge holding the May term, but a judge holding the January, a subsequent term.

3. The motion to vacate was made April 23, 1889, before a justice holding a circuit and special term.

The exceptions taken at the trial were by the terms of the statute to be heard in the first instance in general term.

Of course they could also be considered under the motion

for a new trial addressed to the discretion of the judge who tried the cause, and they, with the other ground assigned, were so considered and overruled and an appeal taken and perfected (R. 14, 15, 16).

Thus all matters of law and fact in impeachment of the judgment were pending in the general term, and the judge holding the circuit and special term had no jurisdiction to entertain the motion to vacate.

It may be added that it was entirely competent for the general term, upon the death of Mr. Justice Merrick, if the defendant in error was without fault, to take the necessary steps to have the case in respect of the grounds alleged in the motion for a new trial and the bill in respect of the exceptions taken at the trial settled by some other judge. No application, however, was made to that effect, but the defendant in error, finding, as he supposed, a facile mode of relief from the judgment in the accident of death, broke away from the jurisdiction of the general term and filed the motion to vacate.

It appears by the principal affidavit filed in support of that motion that "all the proceedings on the said trial were fully and carefully reported by a skilful stenographic reporter jointly employed by the parties to the cause, and his report thereof was, soon after the trial, written out and copied by means of a typewriter, and copies thereof were delivered to the parties, and the same are now easily accessible" (R. 39, f. 62).

By the law of this District a case or bill of exceptions need not be signed or sealed.

R. S. D. C., s. 803.

Thus all the material for settling the case and bill was "easily accessible," and neither required the personal act

of signing or sealing by the judge who tried the cause, and the sole question remaining is whether the judicial act of settling could not be as well done by another judge as the judge who tried the cause.

Under the judicial system of this District, it is submitted, this may be done. There is but one court, composed of the number of judges designated by law, and this court, acting by one of its members, holds as well the circuit as the special terms. "Though the judges may differ, the tribunal is the same."

Ormsby *v.* Webb, 134 U. S. 47, 62.
Met. R.R. *v.* Moore, 121 U. S. 558, 573.

It is difficult to conceive how the act of settling a case or bill of exceptions can differ from any other judicial act when all the evidence is conceded to be at hand.

If exceptional cases exist, as they may when all the evidence has not been reduced to writing or from other cause, it is entirely competent for the judge upon whom may involve the duty of settling the case or bill so to determine.

In the present case there is absolutely nothing to indicate, in the absence of the bill, which was never filed, that the duty of settling could not be as well discharged by any other judge as by Mr. Justice Merrick.

The bill could only present propositions of law. The want of a case showing all the evidence is not even alleged in the motion to vacate, and yet if the case could be settled by another judge there could surely be no difficulty in general term in having the bill of exceptions settled and signed and sealed by that court, always supposing the defendant in error was not in default.

In the argument below two English cases, Bennett *v.* P. & O. Steamboat Co., 32 E. L. and Eq. 318, and Newton *v.* Boodle, 3 C. B. 795, were relied on as showing that when

the benefit of exceptions had been lost by the death of the judge and without default on the part of the exceptant relief might be had by motion for a new trial after the term.

The answer is plain:

1. In each of the above cases the bills of exception were prepared and delivered to the judge within the prescribed time, and the delay that ensued was solely the delay of the judge—in other words, the law's delay.

In the present case, as presented on the motion for a new trial, there is no pretence that at any time the bill of exceptions was ever delivered or tendered to Mr. Justice Merrick, or that he ever saw or heard of it, or that the exceptant ever in any respect complied with the plain provisions of the rule of court governing the settlement of exceptions. (See Rule 63, R. 59.)

The case as presented on the motion is wholly beyond the precedent of the above decisions, and indeed is on its face of purely equitable cognizance. Even if the established doctrine of this Court should be subject to an exception when the delay is solely the delay of the officer of the law, such exception would not reach the present case.

2. The above decisions are, however, plainly the outgrowth of the jurisdiction exercised over judgments after the term, in England, as in the State of Maryland and other States.

In conclusion it is submitted that the wisdom of the established doctrine could not be more fully vindicated than by the action of the court below. Apart from the mode of trial, the utter insufficiency of a court of law to afford adequate relief is shown. At the original trial of the cause both the plaintiff and defendant below were the main witnesses. Since the trial the plaintiff has deceased, and his administrator has been made a party, and should

another trial be had the question must arise whether the defendant can testify in his own behalf.

R. S. U. S. s. 858.

Page *v.* Burnstine, 102 U. S. 664.

In such a case a court of equity, even if it decreed a new trial, could impose equitable terms, and thus prevent the injustice which may ensue from the restricted powers of a court of law.

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Supreme Court of the United States.

OCTOBER TERM, 1892.

FRANK HUME, PLAINTIFF IN ERROR,

v.

RICHMOND IRVING BOWIE,
ADMINISTRATOR, &C.

No. 1107.

Brief for Defendant in Error.
Answer to Brief for Plaintiff in Error.

ENOCH TOTTEN,
for Defendant in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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The argument for the plaintiff in error proceeds upon the theory that the court below possessed no jurisdiction or power to set aside the judgment because the term of the court at which the judgment was rendered was at an end; reliance is placed on the case of Phillips *v.* Negley (117 U. S. 665) to sustain this position. The rule declared in that case has no application to this. There a verdict and judgment had been taken against the defendant, he not appearing, and no motion was made or proceeding was had at that term for the purpose and with the view of setting aside the judgment. Three years and many terms elapsed before any motion to that end was made in the case. Not so here. In this case every step required by the rules and practice of the court was taken during the term which

was necessary to preserve in the court control over the judgment. This is consonant with the doctrine laid down in Phillips *v.* Negley.

The court in that case says (672) that the supreme court of this District has not discretionary power to set aside judgments rendered at a previous term "*without any motion or other proceeding to that end made or taken at that term;*" or, in other words, when proper proceedings have been taken to that end such power or jurisdiction does exist. It is not an unusual thing in this Court to continue motions and proceedings from one term to another, and the supreme court of this District undoubtedly has the power by a special order to continue motions from one term to another. If it shall be found on examination that the necessary steps were taken in this case during the term at which judgment was rendered to preserve in the court full power over the judgment, then the doctrine of Phillips *v.* Negley is not applicable. The only question on this branch of the case, then, is whether or not such proceedings were had in the cause during the term as retained it in the special term, so as to leave the court free to take such action as might be just in reference to the judgment.

After the verdict had been rendered in this case, a motion for a new trial was promptly filed, based upon errors of law and on other grounds (14); this motion was addressed to the discretion of the court, and was made on the minutes of the justice, in pursuance of the provisions of sections eight hundred and three and eight hundred and four of the R. S. D. C., and of rule 54 of the court below (R. p. 20). This motion was entertained by the trial justice and was overruled. An appeal was then taken to the general term (15). When the time for the trial of causes at that special term had ceased, in order to

give time for the preparation of bills of exceptions, etc., the court, in pursuance of the practice and rules of the court, extended or *prolonged* the term for that purpose (22). This order was made July 14, 1888. For reasons explained in the affidavits (18) the bills of exceptions were not prepared and submitted to opposing counsel until October 4, 1888 (18, 24). The proposed bills of exceptions were detained by counsel for plaintiff in error for a very long time, before the conclusion was reached that counsel could not agree and settle them. In the court in general term the charge of *laches* against the counsel of the plaintiff below for delay in tendering bills of exceptions was largely relied upon, although, here, it seems to be practically abandoned. Should the court desire to examine the question of negligence, in preparing and submitting the bills of exceptions, its attention is invited to the affidavit of Mr. Lovejoy (18) and that of Mr. Smith (32.) It will appear from these affidavits that the bills of exceptions were in fact held by counsel for plaintiff in error from October 4, 1888, until March 23, 1889, several weeks after the death of Mr. Justice Merrick.

There is no rule of court in force in the court below prescribing the time within which bills of exceptions shall be settled and filed, nor is there any rule of practice on that subject. The whole proceeding is committed to the discretion of the trial justice. It is idle to argue that because the rule (20) fixing the terms of court declares that the May term "shall not continue beyond the second Saturday of July," therefore that term necessarily ends on that day. This provision plainly relates to trials generally; the rule itself expressly excepts pending trials. Suppose a cause on trial should extend into August, could there be bills of exceptions in such a case? Will this Court on appeal say that bills of exceptions must be signed

within a specified time in the court below? The declarations of this Court are much more liberal than such a course would seem to indicate.

The 62d rule (21) of the supreme court of the District provides that "the bill of exceptions must be settled before the close of the term, *which may be prolonged by adjournment* in order to prepare it." This language may be regarded as somewhat peculiar, yet it can have but one meaning, and that is that the judge holding the court may grant additional time within which to prepare bills of exceptions so as to avoid the very consequences which proved fatal to the defendant in Phillips *v.* Negley. That the court has power to so extend the time for this purpose is well settled, as will be apparent from an examination of the authorities hereinafter cited. It is wholly immaterial whether the order of the court "prolongs" the *term* or extends the *time* to enable counsel to prepare exceptions. When such an order has been made it is wholly immaterial what becomes of the "term." The cause is suspended to await the further action of the judge to perfect the record. Counsel for the plaintiff in error have very ingeniously argued that the technical matter of the court "terms" controls the practice. It seems plain to my mind that after the order allowing the bills of exceptions to be prepared and settled without regard to the term, and in the future, has been made, the validity of the subsequent action of the court in relation to bills of exceptions or to other positions of the case growing out of the right of the parties to bills of exceptions is wholly independent of the "terms" of the court.

Suppose that Mr. Justice Merrick had recovered from his illness and had signed and sealed the bills of exceptions in this case on the 23d of April, 1889 (the date when the motion to set aside the verdict was made, based on the

ground that the trial judge being dead the bills could not be settled, signed, and sealed), would the bills of exceptions have been effective on appeal? This Court has declared that they would, and the correctness of this practice must now be regarded by the bar as settled by this Court.

R.R. Co. *v.* McDade, 135 U. S. 554.

The practice in that case was in all respects like the practice pursued here, except that the order extending the term or the time for the purpose of settling bills of exceptions was *general;* it did not mention or specify the causes in which the bills were to be settled, as in this case. Neither in that case nor in this *was the time limited* within which the bills should be prepared or settled.

This Court was there content to say, in disposing of this technical objection to the legality of the practice and to its jurisdiction, as follows:

"We think the court in general term acquired jurisdiction of the case; and as it comes here regularly from that court we shall proceed to consider it upon its merits" (p. 568).

The manner of settling bills of exceptions and the time within which it shall be done depends upon the rules of court and the judicial discretion of the presiding justice, and the rules of court will be disregarded in the interest of justice. Such rules are merely directory.

This Court has repeatedly declared that the time within which the bill of exceptions shall be presented rests in the discretion of the presiding judge, and he, and he alone, is to determine what is a reasonable time for such presentation.

Hunnicut *v.* Peyton, 102 U. S. 354.

U. S. *v.* Breitling, 20 How. 252.

Stanton *v.* Embrey, 93 U. S. 548.
Dredge *v.* Forsyth, 2 Black, 564.
Philips *v.* Mayer, 15 How. 160.
Turner *v.* Yates, 16 How. 28.

This Court, speaking through Taney, C. J., declared, in reference to this subject, that it is "always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it."

U. S. *v.* Breitling, 20 How. 354.
See Hunnicut *v.* Peyton, 102 U. S. 358.
Embrey *v.* Stanton, 93 U. S. 548.

In Dredge *v.* Forsyth (2 Black, 568) it is said:

"It is always allowable, if the exception be seasonably taken and reserved, that it may be drawn out and sealed by the judge afterwards, and the time within which it may be so drawn out and presented to the court must depend upon the rules and practice of the court and the judicial *discretion of the presiding justice.*"

In U. S. *v.* Breitling (20 How. 252) the rule of the circuit court provided that no bill of exceptions could be signed after the adjournment "unless by consent of counsel in writing." * * * The Court, in deciding the question, said:

"It is always in the power of the court to suspend its own rules or to except a particular case from its operation whenever the purposes of justice require it. * * * The time within which it (the exception) may be drawn out and presented to the court must depend upon its own rules and practice and on its own *judicial discretion.* In the case before us the judge who tried the case has deemed it his duty to seal and certify the exceptions to this Court,

and, under the circumstances stated, we think he was right in doing so, and that the exception is legally before the Court, and a part of the record."

In Walton *v.* U. S. (9 Wh. 657) it is said: "It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty, and it may afterwards, according to the rulings of the court, be reduced to form and signed by the judge, and so, in fact, is the general practice."

In Turner *v.* Yates (16 How.) the court says further:

* * * "The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held."

In Stanton *v.* Embrey (93 U. S. 548), at page 554, the court said:

"Attempt is also made to maintain that the allowance of the bill of exceptions is irregular and the same is not before the court. * * * Beyond doubt (page 555) the record must show expressly or impliedly that the exception was taken and reserved by the party at the trial, but it is a mistake to suppose that they must be drawn out and signed and sealed by the judge before the jury retire from the bar. * * * On the contrary, it was always allowed if the exception is seasonably taken and reserved, that it may afterwards be put in form and filed in the case pursuant to the order and direction of the justice who presided at the trial. Apply that rule to the case before the court, and it is clear that the objection of the defendant in error is without merit, as it appears by the record that the objections were taken at the trial of the cause, and that the bill of exceptions was signed by the judge at the request of the defendants and filed in the case *nunc pro tunc*, which brings the case within the set-

tled practice of courts of error, even if governed by the strictest rules of the common law."

In Hunnicut *v.* Peyton (102 U. S. 333) an objection was made against considering the bills of exception at all. The verdict was rendered on February 17, 1877; judgment on the same day. On the 19th a motion was made for a new trial, which was overruled on the 20th. On the 24th a writ of error was sued out, and the bill of exceptions was signed on February 28, and filed on March 1.

The plaintiffs' counsel objected that the bills of exceptions were not presented for signature within the time limited by the rule, which provided: "No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial." On March 1, twelve days after the close of the trial, an order was made extending the time for filing the bill unto that day, the plaintiffs objecting, and the bill was then filed. The court said (page 353):

"The rule requiring the presentation of bills for the signature of the judge within five days is not a rule which controls his action; he may depart from it in order to effectuate justice. It is a *direction to the parties* and it expressly reserves the power to enlarge the time. It is, no doubt, necessary that exceptions should be taken and at least noted before the rendition of the verdict; but the reduction of the bills to form and the signature of the judge to the bills required for their attestation, or, as was said in the statute of Westminster, for a testimony, may be afterwards during the term; * * * for this reason it has always been held that the exception need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over. The time within which the signature of the judge must be applied for, if within the term, is left to the discretion of the judge who noted the exception when it was made. It is true a

judge cannot be permitted to make up a statement of facts after the writ of error is issued, upon which the case shall be heard. That is quite a different matter. But when the exception has been taken at the trial and noted, reducing the exception to form afterwards, and attesting it, is not making a new case; it is merely verifying the case as it appeared on the trial. * * * If it be kept in mind that the judge's signature is required only for 'testimony' that the exception was taken at the trial and before verdict, it cannot be material that the 'testimony' was given at the close of the trial, if given during the term."

In *Ex parte* Crane (5 Peters, 199) the court said that at common law a writ of error lay only for errors apparent on the record. To remedy that defect the party had a right to require the court to settle a bill of exceptions and thereby bring up other errors of law for review. "This bill of exceptions is in the nature of an appeal," but it brings only the question excepted to.

Ex parte Bradstreet (7 Pet. 291 634), Life Insurance Co. *v.* Wilson, (8 Pet. 291), Chateaugay Iron Co's case (128 U. S. 544), are all cases in which it was held that a mandamus was the proper remedy to compel the signing of a bill of exceptions.

In the case of the Chateaugay Iron Company (128 U. S. 544) the verdict and judgment were rendered against the defendant on the 25th of January, 1888, and an order was made and entered allowing the defendant forty days within which to prepare and serve a "case," with leave to "turn the same into a bill of exceptions." This extension of time expired March 5, *and within the term.* On the 3d of March a proposed bill of exceptions was served on counsel for the plaintiff, and it was by them accepted and retained. On the 13th of March plaintiff's counsel applied to the defendant's counsel for ten days additional time to prepare and serve amendments, which

application was granted, and a stipulation to that effect was signed by defendant's counsel. March 23 the plaintiff's counsel served on the counsel for the defendant seventy-seven proposed amendments; some of these were agreed to and some were not. March 27 the defendant's counsel notified counsel for plaintiff that they would present the proposed bill of exceptions and proposed amendments to the trial judge on the 10th of April. On the 31st day of March the term of the court at which the cause was tried expired. At the time appointed (April 10th) the counsel on both sides appeared before the judge, and counsel for the plaintiff objected to the settlement of the bill of exceptions on the ground that the forty days as well as the term of the court had expired, and that the judge was without jurisdiction. The judge, accordingly, refused to sign the bill of exceptions. This Court issued a writ of mandamus to compel the judge to sign and seal the bills of exceptions.

As it was in the case of Coe *v.* Morgan (13 Fed. R. 844), counsel appeared to have been unfamiliar with following the rules of practice of the State courts; they had not complied with the rules of the Federal court as to settling the bill of exceptions in any respect. The term had expired and there was neither an order of court nor a formal consent of counsel allowing additional time beyond the term for settling the bill of exceptions, but the counsel for the plaintiff retained the proposed bill of exceptions six days beyond the time allowed by the rule, and then asked for, and was granted by defendant's counsel, ten days additional time. This Court held, on an application for a mandamus to compel the judge to sign a bill of exceptions:

"That the rights of the defendant were saved by the

express order of the court made during the term and by a sufficient compliance on the part of the defendant with the rules of the circuit court, and by what must be held to have been the consent of the plaintiff" (p. 556).

In Teft *v.* Windsor (17 Mich. 425) it was held that the judge who tried the case and before whom the exceptions were noted could sign the bill after he had resigned his office. In Scribner *v.* Gay (5 Mich. 514) the court declared it to be the settled practice in England to allow a motion for a new trial without reference to lapse of time, where a party, by the death or resignation of a judge, has lost his exception; and in the case of The People *v.* The Judge (41 Mich. 726), the trial judge having died, leaving the bills of exceptions unsigned, it was held that the granting of a new trial was a matter of course.

In a Maryland case (State *v.* Weiskettle, 61 Md. 48), the term of office of the trial judge had expired, but by virtue of a stipulation the bill of exceptions was signed and sealed by him, notwithstanding the expiration of his official life. The court of appeals of Maryland felt bound, notwithstanding the stipulation, to grant a new trial, although many months had elapsed.

The court, in disposing of the case, said:

"It is the established practice now, both in England and in this State, that when a party, without *laches* on his part, loses the benefit of his bill of exceptions by the death or illness of a judge, so that he cannot get his exceptions signed and sealed, he will be entitled to a new trial, notwithstanding the lapse of considerable time. (Alex. British Statutes, 133; Bennett *v.* Penn. & O. Steamboat Co., 32 E. L. & Eq. 318; Newton *v.* Boodle, 54 E. C. L. 795). In the last-cited case seventeen months had elapsed, yet the court thought it possible the party might be entitled to a new trial, and therefore laid a rule to show cause why a new trial should not be granted. In that

case the new trial was not awarded because the law was found to have been correctly laid down. In this State it is not admissible for any other judge to pass upon the correctness of his predecessor's ruling in such case. The new trial will go as a matter of course, where the exceptions were not signed and sealed, and cannot be, without any fault of the exceptant."

The grounds upon which these cases are placed are that the party having duly taken his exceptions and had the same properly noted, he cannot be deprived of his right to have his case heard, even by the death of the judge.

It seems to be the rule that the trial judge in the interest of justice may exercise the broadest discretion in securing to the party a right to be heard on his exceptions. It would be a reproach upon the courts if it were not so. In U. S. *v.* Breitling the bills of exceptions were signed after the term of the court had been finally adjourned, and there was neither an order of court nor a stipulation of counsel enlarging the time for the purpose; yet the bill was upheld. In Embrey *v.* Stanton, which came up from this District, the verdict was rendered March 13, 1873, and the bill of exceptions was not filed and made of record, as the rules required, until August 4, 1874, seventeen months after the verdict; and this practice was sustained. Several terms passed by during this interval.

In the case of Coe *v.* Morgan (13 Fed. R. 844) the Court said:

"The failure to serve the bill of exceptions in time arose wholly through inadvertence, and because of the unfamiliarity of the attorney for the plaintiff with the practice in the Federal courts. As soon as he was informed of his error he served the proposed bill. This was about *three weeks* subsequent to adjourning of the court at which the action was tried. No bad faith is alleged, and no injury to the defendant by reason of the de-

lay is suggested. But it is contended that because the plaintiff did not procure the bill of exceptions to be served, settled and signed, or obtain an order extending time at the trial term, he is now out of court and remediless. The attorney was no doubt guilty of laches, but the punishment suggested is out of all proportion to the fault. No judgment has been entered; the proper parties are still in the circuit court. In the absence of a positive statute there can be no valid reason why the court in the exercise of a sound discretion should not relax its rules sufficiently to provide for a case of such manifest hardship."

In Greenway *v.* Gaither (Taney's Dec. 227), Taney, C. J., declared that he "should deem it his duty to seal the exceptions," although it was presented *two years* after the trial, if he had any doubt as to the correctness of his rulings upon the question of law presented. See also Underwood *v.* Hassock, 40 Ill. 98; Peck *v.* Steamship Co., 3 Bosw. 622.

In Foote *v.* Silsby (1 Blach. 542), Mr. Justice Nelson, holding a circuit court, allowed a writ of error and signed a bill of exceptions two years after the trial; and in Marye *v.* Strouse (5 Fed. R. 494), in the 9th circuit, it was held that a case may be excepted from the operation of the rule of court requiring a bill of exceptions to be drawn up within ten days after the trial when to do so will subserve the ends of justice.

The principle to be deduced from these cases is that only a substantial compliance with the rules of court is required in any case, and that when it is necessary to avoid injustice the rules themselves will be disregarded. This is to favor and not to obstruct the right to a hearing in the appellate tribunal.

In the case of Jones *v.* R.R. Co. (5 Mackey, 426) the bills of exceptions were signed long after the term had been adjourned *sine die*, and the same kind of an order

had been made extending the time for settling bills of exceptions as we find in R.R. Co. *v.* McDade. A motion was made in general term to dismiss the appeal on the ground that the justice holding the special term was without jurisdiction to sign and seal valid bills of exception because the term at which the judgment was rendered had been adjourned *sine die.* The counsel for the plaintiff there asserted that the order extending the time or prolonging the term in order that the bills of exceptions might be settled was without effect because the order was *general* as to all cases, and that it *did not limit the time* within which the bills should be prepared and signed and sealed. The motion was elaborately argued by counsel, and the court rendered an elaborate opinion denying the motion and holding that the order was effective and valid. This opinion was printed and filed in the case of R.R. Co. *v.* McDade, in this Court, in the form of an additional brief. It was so filed by the plaintiff in error in that case as an argument and an authority against the motion to dismiss. The attention of the Court is especially invited to this opinion (5 Mackey, 426), as a full and complete answer to the argument in behalf of the plaintiff in error on this motion. It is entitled to consideration because it is the interpretation which that court gave to its own rules.

If Mr. Justice Merrick could have settled, signed, and sealed valid bills of exceptions in this cause in April, 1889, had he recovered and returned to duty, then it must follow, under the provisions of the 64th rule, that if for any reason he should have been "unable to settle the bills of exceptions" he could have set aside the verdict and judgment and granted a new trial. Is the plaintiff below to suffer a wrong or be deprived of his right of appeal by the death of the trial judge?

It is not an important question here whether or not the *term* of the court was extended or whether or not it was adjourned *sine die*. The real question is, did the order of the court extend the time for settling and filing the bills of exceptions? We are not concerned about "terms" of the court, as has been said before. To extend the *time* is all the 62d rule of the court undertakes to do. and this is all the order of the court of July 14, 1888 (22), did. It extended the *time* in order that counsel might have opportunity to prepare bills of exceptions. If this rule is valid, and this Court has sanctioned it in R.R. Co. *v.* McDade, then it cannot be denied that as soon as the possibility of settling the bills became extinct, by the death of the trial judge, Rule 64 became controlling and the plaintiff became immediately entitled to a new trial.

It cannot avail the plaintiff in error anything that the statutes regulating the practice in the court below relative to bills of exceptions say that they need not be signed or sealed. While this may be true as to the supreme court of the District (and this has been denied), it is not sufficient as to this Court. Without the signature of the trial judge to the bills of exception this Court cannot entertain the case, and the plaintiff below would therefore have been deprived of his right of appeal. The right of appeal is as sacred as the right to a trial in the first instance.

The rules of court and the statutes adopted and made to govern the practice and proceedings in the supreme court of the District of Columbia have no application to the manner of obtaining a review of a cause in this Court by means of a writ of error to that court.

The statutory provisions relating to the re-examination in this Court of judgments, orders, or decrees of that court are contained in section 846 of the Revised Statutes, relating to the District of Columbia, which are in the following words :

"Any final judgment, order, or decree of the supreme court of the District may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts of the United States." (R. S. D. C., sec. 846.)

This section is identical in terms with the eleventh section of the act of March 3, 1863, establishing the supreme court of the District of Columbia, except that the section last mentioned adds to the above section the four words, "for the District of Columbia." But these words do not change the effect of the statute, as the proceedings in error or appeal from judgments or decrees of that circuit court were regulated in the same way. (Thompson *v.* Riggs, 5 Wall. 677.)

In cases from a circuit court of the United States, where it is desired to have reviewed the rulings of the trial court, as to admitting or rejecting evidence, or as to instructing or refusing to instruct the jury, there must be a bill of exceptions. In no other way can such a cause be reviewed here. And the bill of exceptions must conform to the statute of Westminster and the other regulations governing the practice, in this particular, in the circuit courts. The lower court could not, if it would, regulate the manner of bringing causes to this Court for review.

Thompson *v.* Riggs, 5 Wall. 675.

Counsel for the plaintiff in error, acting upon their idea that we have here a question of "terms" of court, say that if the proceedings complained of by them cannot be assigned to a particular "term" they must be void. Hence they argue that inasmuch as the justice who ordered that this motion for a new trial be heard in the general term in the first instance was holding a subse-

quent term he was without jurisdiction in this cause, it having been tried during the May term of the court. But if Mr. Justice Merrick had been living he could have made this order; being dead, some other judge could make it. The plaintiff was not without a remedy. The general term could not have given the relief to which he was entitled, because it could get no jurisdiction of the cause except by appeal. There being no bills of exceptions signed and sealed, the case was not in that branch of the court, and could not get there in any other way than by such an order as was made in this case. It may be further remarked on this point that the supreme court of this District is a unit. This Court has declared that an appeal from the special term to the general term is not an appeal from one court to another, but is simply a step in the progress of a cause during its pendency in the same court. Although the judges may differ, the tribunal is the same. (R.R. Co. *v.* Moore, 121 U. S. 573; Ormsby *v.* Webb, 134 U. S. 62.) This being the true view of the law in relation to that court, it cannot be important or material which of the justices acted on the motion for a new trial at the special term. The chief justice, who signed the order, was the only person who could exercise jurisdiction. He was holding a special term, and "*Division* No. 2" of the court, wherein the cause was tried, was at an end, although it had not been formally adjourned *sine die*.

The motion of the defendant in error to dismiss this writ of error ought to be granted.

ENOCH TOTTEN,
For Defendant in Error.

148 U.S. 298

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Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1107.

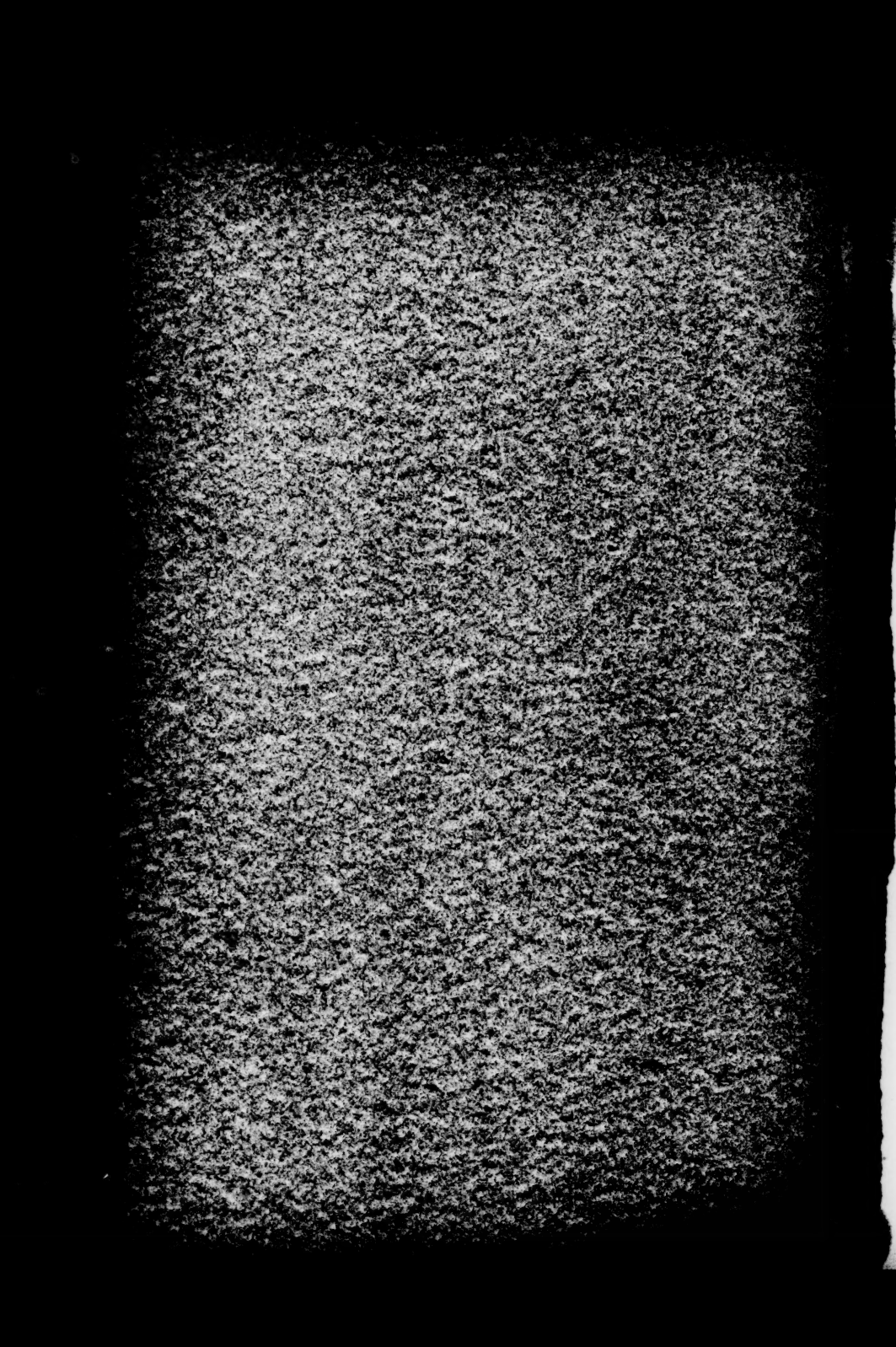
FRANK HUME, PLAINTIFF IN ERROR,

vs.

RICHARD IRVING BOWIE, ADMINISTRATOR, &c.

Supplemental Brief for the Plaintiff in Error.

W. D. DAVIDGE,
For Plaintiff in Error.



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Supplemental Brief for the Plaintiff in Error.

The failure of the defendant in error to open fully in his first brief will, it is hoped, be a sufficient apology for this supplemental brief.

An attempt is made to distinguish *Phillips* vs. *Negley* from the present case. It is said that in the former there was no motion, while in the latter there was. The real question, however, is whether there was any motion or judicial act whereby the control of the court over the judgment continued beyond the term at which it was rendered. An examination of the present record will show that there

was, after the judgment and during the term, a motion for a new trial, which motion was overruled and an appeal taken to the general term. The record also shows that provision was made by order for bills of exceptions, the term being extended for that purpose beyond the limit fixed by the rule. Now, these are the only two acts, whether of the court or party, which can possibly be relied on to support the jurisdiction of the court, after the term and the next ensuing term, to entertain and act upon a motion to vacate based upon the death of the judge, after the term and the next ensuing term, without having signed the bill of exceptions. As to the first of these acts, it cannot be seriously contended that a motion made and overruled followed by an appeal had the effect of continuing the control of the court over the judgment beyond the term; and, as to the order in relation to exceptions, it would seem equally plain that it could have no such effect.

The order had no reference whatever to the judgment, but related simply to proceedings in error—that is, to the settlement of bills of exceptions. The court had rendered the judgment, and on the motion for a new trial had refused to disturb it. Thus the court had finally acted in respect of the judgment, and the whole effect and scope of the order was to afford, by the settlement of the exceptions, the means whereby alleged errors in the judgment could be litigated before another tribunal, the court in general term. In the brief already filed in behalf of the plaintiff in error it has been shown that the order thus limited in *purpose*, was, by its terms, further limited in *execution* to the current term of the court, and could not be executed after that term, and that, even if it could be executed after the term, it would

not have the effect of extending the term at which it was made, indefinitely, and, not only for the purpose mentioned in it, but for any and all purposes.

It thus appears clear that whilst in *Phillips* vs. *Negley* there was no motion or act during the term, but the motion to vacate was made at the next term (not three years after the judgment, as stated in the brief of the other side), and in the present case there was a motion for a new trial and an order for the settlement of exceptions during the term, these circumstances do not in any degree distinguish the present case from the former. The judgment of the court brought here for review is not a judgment rendered under the motion for a new trial or in exercise of the order. On the contrary, the judgment was rendered under a new and independent motion, based on the death of the judge, and made after the lapse of the term at which the original judgment was rendered and the ensuing term and, indeed, well nigh a third term, thus bringing the present case directly within the doctrine of *Phillips* vs. *Negley*.

A word as to another matter:

It is argued in the opposing brief that when a party has lost the benefit of exceptions by the death of the judge a new trial will be granted, and the two English cases mentioned in the brief of the plaintiff in error and a late Maryland case, *State* vs. *Weiskittle*, 61 Md., are referred to.

It may be conceded that when the bills have been duly placed in the hands of the judge during the term, and by his death the exceptant has without fault on his part been deprived of his exceptions, a new trial may be granted; but the question here is whether the court of law that rendered the judgment has jurisdiction after the term, even in

the case supposed, to vacate the judgment or whether the remedy must not be brought by bill in equity, as declared by this court in *Phillips* vs. *Negley*, where the only exceptions to the rule requiring resort to equity are specifically stated.

It is true that in the two English cases and also in the Maryland case the remedy was afforded by the court of law by reason of its control after the term over its judgment, but this is the very doctrine repudiated by this court from the beginning, and especially in *Phillips* vs. *Negley*. Apart from this, however, a complete answer to the asserted jurisdiction of the court of law is found in the fact that the acknowledged predicate of it is that the bills of exceptions have been only placed in the hands of the judge during the term, and here that the delay in their settlement may be said to be the delay of the law or its proper officer.

In the present case the bill of exceptions was not at any time placed in the hands of the judge, nor does it appear that either during the term or after it to the day of his death he ever saw or heard of it; and, more than this, the case presented to the court below in support of the motion to vacate was not that of a party not in fault, but, on the contrary, of a party confessedly in fault, but claiming to be entitled, under the circumstances, to indulgence. Thus the assumption of jurisdiction by the court below cannot be defended by anything to be found in the cases relied on, but, on the contrary, is directly opposed to the doctrine they declare.

So far from the death of the judge causing the loss of the bill of exceptions (if there was such loss), it is submitted that had the judge lived he could not have signed and sealed the bills save by the consent of the plaintiff in error. Any

legal right to the bill had been lost long before the death of the judge. Under the settled doctrine of this court (Muehler *vs.* Ehlers, 91 U. S., 250), had he signed and sealed the bill his act, without such consent, would have been a nullity, and, had he refused, no court would have compelled him to sign and seal.

W. D. DAVIDGE,
For Plaintiff in Error.